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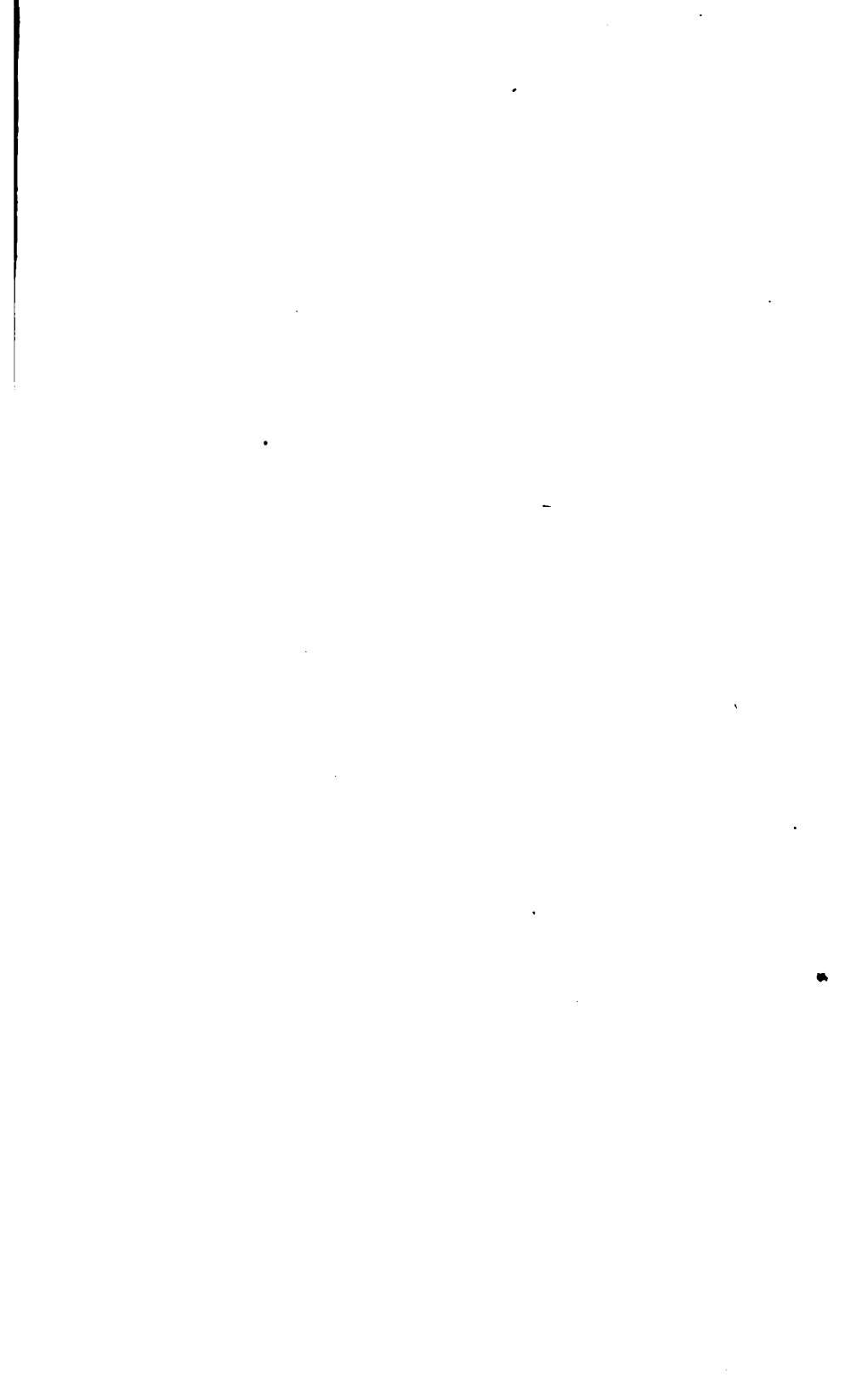
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
AND
OTHER COURTS.

With Tables of the Cases and Principal Matters.

BY
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AND
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BARRISTERS AT LAW.

VOL. I.
Containing the CASES from EASTER Term, 59 GEO. III.
to HILARY TERM, 60 GEO. III. and 1 GEO. IV.,
BOTH INCLUSIVE.

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J U D G E S

OF THE

COURT OF COMMON PLEAS,

During the Period comprised in this VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.



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ERRATA.

Page 69. line	9. of the marginal note, after "common," insert "in."
—	35. of the marginal note, <i>dele</i> "covenant."
104.	18. for "Plaintiff," read "Defendant."
113.	30. for "means," read "mean."
122.	3. for "I am aware of," read "there are indeed."
136.	29. <i>dele</i> "post."
173.	3. for "demanded," read "demised."
181.	7. <i>dele</i> "and if."
185.	25. between "introduced" and "more" insert "no."
241. }	<i>Richardson J. was present at the argument of the case</i>
264. }	<i>of Williams v. Bosanquet, and concurred in the judg-</i>
318.	<i>ment.</i>
350.	19. <i>dele</i> from "on" to "counterpart" in line 21 of the
—	<i>same page.</i>
441.	27. of the marginal note, for "A." read "B."
502.	30. of ditto for "B." read "A."
	32. <i>dele</i> from "Besides" to "statute" in line 34 of the
	<i>same page.</i>
	17. after "Plaintiffs" for "," read ";" and after
	"event," for ";" read ";"

CASES

ARGUED AND DETERMINED

1819.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Fifty-ninth Year of the Reign of GEORGE III.

WATKINS v. HEWLETT.

April 28.

THIS was an action for money lent, money had and received, and on the other money counts; and upon the trial of the cause at *Guildhall*, at the sittings after *Hilary* term, 1819, before *Dallas C. J.*, it appeared, that the Plaintiff having been charged as the putative father of a child, wherewith a pauper of the parish of *Horfield* was pregnant, and which was likely to be born a bastard, and to be chargeable to the parish, as evidence as a receipt on a receipt stamp, and does not require an agreement stamp, as evidence of a contract.

If the putative father of a bastard, pay, before its birth, a fixed sum to the parish officers to discharge him of all future responsibility for the maintenance of the child, after the birth and death of the child he may recover back such part of the money as remains unexpended, as had and received to his use.

VOL. I.

B

parish,

1819.
 WATKINS
 v.
 HEWLETT.

parish, gave the Defendant, who was then a parish officer of *Horfield*, his promissory note for 35*l.*, upon which the Defendant gave him a receipt, upon the appropriate receipt stamp, expressing, that the Defendant had "received of the Plaintiff, a bill at two months, for 35*l.*, which, when paid, would discharge him from the expences of an illegitimate child, which was likely to become chargeable to the Defendant's parish." The Defendant negotiated this note, and received thereon the sum therein specified, and the note, when due, was paid by the Plaintiff. The child was born a bastard, and died a few days after its birth, and there was no distinct evidence, that any part of the 35*l.* was expended by the parish, on its birth, maintenance, or burial. The Plaintiff now sued to recover the residue as money had and received to his use, upon the authority of *Stainforth v. Staggs* (a), and the *King v. Martin*. (b) *Hullock* Serjt. for the Defendant, contended, that the receipt offered in evidence, was offered as proof of a contract which subsisted between the parties, stipulating the terms on which the sum of 35*l.* was paid; and that whether the paper itself contained the contract, or were only evidence of the contract, the subsisting stamp act (c), required that it should bear an agreement stamp. *Dallas* C. J. was of opinion, that the evidence was admissible, but reserved the objection; and there being no proof of any money expended on the infant, a verdict passed for the Plaintiff for 35*l.*, with liberty to the Defendant to move to enter a nonsuit, if the evidence had been improperly admitted.

Hullock Serjt. now moved to set aside the verdict and enter a nonsuit; he admitted, that after the cases

(a) Cit. 1 *Campb.* 398. n.

(b) 2 *Campb.* 268.

(c) 55 G. 3. c. 184.

above cited, he could not contend that the action was not maintainable, but he renewed the objection, that this paper was offered as evidence of a contract, and, therefore, ought to have been marked with an agreement stamp; to make it admissible in evidence merely as a receipt, it ought not to contain any thing beyond the bare fact of payment of the money.

1819,
WATKINS
v.
HEWLETT.

PARK J. This objection would in all cases confine the use for which a receipt can be produced in evidence to the bare fact of the payment of a sum of money, excluding all evidence of the consideration on which it was paid.

BURROUGH J. The right to recover this money proceeds not on any contract, but on the facts which have subsequently to this payment occurred, the birth and death of the infant. Suppose there were a receipt for 500*l.* for building a house, or for a house to be built, would that be incapable of being produced in evidence, as being proof of an agreement?

RICHARDSON J. The objection goes to this extent; that if in any case a receipt notices the terms or consideration of the payment, it requires an agreement stamp. This action proceeds not on any agreement contained in this paper, but on the ground that upon the facts of this case a part of this money is become recoverable by the law of the country. The receipt merely shews the money to have been paid on account of the maintenance of a bastard child. The doctrine contended for would go to this extent, that a receipt must never express any thing except the bare fact of payment of a sum of money.

Rule refused.

1819.

May 1.

BOWER, Clerk, v. MAJOR.

Where an occupier of land, who had been under composition for tithes, refused to pay the composition, or set out tithes in kind, alleging that he was exempted by a modus: Held, that in an action on 2 and 3 *Edw. 6.*, for the treble value of the tithes, it was not necessary to prove a notice to determine the composition; the occupier's disclaimer of the rector's title to tithes in kind rendering notice unnecessary.

DEBT on the statute 2 and 3 *Edw. 6. c. 13. s. 1.*, by the Plaintiff as rector of the parish of *Staple Fitzpaine*, against the Defendant, as the occupier of lands in the same parish, for the treble value of tithes which the Defendant had omitted to set out. On the trial before *Best J.* at the *Somersetshire* spring assizes, 1819, it appeared that the Defendant had at one time paid the Plaintiff a composition for all his tithes, that for two years preceding the trial, he had again paid his tithes in kind, except the tithe of hay; which he had not paid, either in kind or by composition. There was no evidence of any determination of the composition as to the tithe of hay, either by agreement or notice; but the Plaintiff's proctor proved that the Defendant had refused for the two last years to set out the tithe of hay, insisting that he was exempted by a modus. On the part of the Defendant, it was contended that the Plaintiff was not entitled to recover, without giving evidence of a notice to determine the composition. But *Best J.* having likened this to the case of landlord and tenant, [where, if there is evidence that the tenant has disclaimed his landlord's title, the landlord may recover in ejectment, without proving a notice (a) to quit,] the jury found a verdict for the Plaintiff.

Pell Serjt. now moved for a rule to shew cause why a new trial should not be granted, on the ground, that whatever the rule might be in ordinary cases between landlord and tenant, in a penal action like the present, the Defendant ought not to be concluded by

(a) See *Buller's N. P.* 96.

were evidence of a conversation, in which he had spoken of a *modus*; but that a notice to determine the composition ought to have been distinctly proved. The point, he said, was quite new, and he could find no case on the subject.

1819.

BOWER

v.

MAJOR.

DALLAS C. J. We cannot distinguish this from the case of landlord and tenant, the principle is quite clear.

The rest of the Court concurring, *Pell* took nothing by his motion.

TOUSSAINT v. DARBON.

May 1.

THE Plaintiff had employed the Defendant, a wine cooper, to convey, for certain hire to be therefore paid to the Defendant, a quantity of wine, part of the Plaintiff's private stock, from the house of *Starling* at *Highgate*, to the house of *Rice* in *Jermyn Street*. The wine, which was of the best quality, having been changed on the road, and very bad liquor substituted for it, the Plaintiff brought this action on the case against the Defendant, for a breach of duty, alleging that she had converted the wine to her own use, and substituted other wine for it. At the trial before *Dallas C. J.* during the *Middlesex* sittings after *Hilary* term, 1819, the jury found a verdict for the Plaintiff, with 30*l.* damages.

In an action against a wine-cooper, for changing on the road wine which she had been hired to carry from one house to another, the Court will not *presume* that the wine was removed for the purpose of sale, and so consider the transaction illegal under the excise laws.

Lens Serjt. now moved to enter a nonsuit, on the ground, that under the excise laws, especially 26 G. 3. c. 59. wine could not be moved for the purpose of sale,

1819.

TOUSSAINT

v.

DARBON.

from one private stock to another, by any but a licensed dealer, or by an auctioneer for the purpose of being sold by auction. If the wine to be removed were a gift, a permit might be procured, but never where the removal took place upon a sale, except as before stated. By the 8th and 9th sections of the act, wholesale dealers were obliged to take out a licence, and by the 11th, retail dealers also. Here, there was neither licence nor auction. The Plaintiff, however innocently, sold, and ordered the wine to be removed contrary to the regulations of the wine laws. This, therefore, was an illegal transaction, and both parties being *in pari delicto*, the Plaintiff could not recover.

DALLAS C. J. Where do you find that the wine was removed on sale? there was no evidence to that effect. The whole history of the wine was clearly traced. It was shewn that a merchant had taken it out of the king's warehouse, and had regularly paid the duty. The merchant, being about to quit business, proposed to send some of the wine to a friend at *Hampstead*. The gentleman at *Hampstead*, afterwards disposed of it to the Plaintiff, who employed the Defendant to remove it to the house of *Rice* in *Jermyn Street*, the Defendant engaging to procure the proper permits. There was no evidence of any sale by the Plaintiff to *Rice*, though there might be such a presumption. The Plaintiff had nothing to do with the importation, and there was no breach of the revenue law.

BURROUGH J. The case has nothing to do with the excise laws.

PARK J. I am of the same opinion. But I think, my Lord's candor has gone too far in presuming that

this was a sale, when as a gift, it might be legally removed.

RICHARDSON J. A gift of the wine would be lawful. Why are we to suppose that this wine was sold, rather than given?

Rule refused.

1819.

TOUSSAINT

v.
DARBON.

GODSON, Gent. v. HOME.

May 1.

ACTION for defamation. Upon the trial of the cause at the *Worcester Spring Assizes*, 1819, before *Richardson J.* it appeared, that *Nash* having employed the Plaintiff to sue *Giles*, executor of *Wilder*, the Defendant wrote to *Nash* in the following terms: "Sir, To my great astonishment, Mr. *Giles* informs me, that you have employed Mr. *Stephen Godson* of *Worcester*, to trouble him for the debt due to you from the estate of Mr. *Wilder*." The writer, after advising *Nash* at some length to desist from this action against *Giles*, proceeded as follows: "If you will be misled by an attorney, who only considers his own interest, you will have to repent it: you may think, when you have once ordered your attorney to write to Mr. *Giles*, he would not do any more without your further orders, but if you once set him about it, he will go to any length without further orders." *Richardson J.* left it to the jury to consider, whether the expressions above cited, were

The Defendant having written a letter, blaming the person to whom it was addressed for employing the Plaintiff to sue, added, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it. You may think, when you have ordered your attorney to write to Mr. *B.*, he would not do any more without your further orders; but if you once

set him about it, he will go to any length without further orders."

Held, in an action for defamation, that the jury were properly directed to consider whether these expressions were meant of the profession in general, or of the Plaintiff in particular; and that it was not necessary to leave it to them to consider whether this was a confidential communication, or a malicious attack on the Plaintiff's character.

1819,

Gibson

HARRIS

cautions against professional men in general, or aimed at the Plaintiff in particular, and if they thought the latter, to give lenient damages. The jury found a verdict for the Plaintiff, damages one shilling.

Copley Serjt. now moved for a rule to set aside the verdict, and enter a nonsuit, on the ground that the learned Judge ought to have left it to the jury, to consider whether this was a confidential communication made by the Defendant to a friend, for the purpose of giving him useful advice, or written maliciously, for the purpose of vilifying the Plaintiff; and he cited *Dunman v. Bigg* (a), where, in a similar case, Lord Ellenborough C. J. left it to the jury to determine, whether the expressions complained of were written as confidential advice, or with a malicious intention.

RICHARDSON J. I cannot say, that I left it to the jury, whether this was a confidential communication; I thought it exceeded the line of confidential communication. If a man, giving advice, calls another thief, surely it is not necessary to leave it to the jury, whether such language is a confidential communication. I left it to the jury to say, whether this was a caution against employing attorneys in general, or against the Plaintiff in particular.

DALLAS C. J. The effect of the expressions complained of, was substantially left to the jury. This did exceed the line of confidential advice.

BURROUGH and PARK Js. concurred in

Refusing the rule.

(a) 2 Campb. 262. n.

1819.

PARKER v. BARKER.

May 1.

THIS was an action for money had and received, brought for the purpose of trying whether the Plaintiff had been a trader within the meaning of the bankrupt laws. On the trial before *Wood B.*, at the *Lancaster Spring Assizes*, 1819, it appeared, that the Plaintiff resided under the roof of *Greenwood*, his brother-in-law, who had long been a trader. *Greenwood*, being insolvent, persuaded the Plaintiff, who was just then of age, and come into the possession of a landed estate, to enter into partnership with him. There was a long negotiation between them, and many conversations with creditors were proved, in which the Plaintiff sometimes said, he had become a partner, sometimes that he was about to become a partner, with *Greenwood*. There was no evidence of any express agreement, nor of any interference in the business by the Plaintiff, except that he had once gone in company with *Greenwood* to a dyer's, and having enquired about some goods that were left with him to be dyed, spoke of them as the joint property of himself and *Greenwood*. It appeared, also, that the date whereat the Plaintiff became a partner with *Greenwood*, was the 22d of *March*, 1816, and that a commission of bankrupt issued against *Greenwood* on the 9th of *May*, so that the partnership, if any, only lasted from the 22d of *March* till the 9th of *May*. Some consignments of goods came in during that period, but no act of buying or selling was proved. It was contended, that these acknowledgments and acts of the Plaintiff were not sufficient evidence of his being a trader, and that it was necessary to shew an actual buying and selling between

In order to constitute a party a trader within the meaning of the bankrupt laws, it is sufficient that he acknowledge himself to have been in partnership with one who was a trader; and is proved to have given directions in the concern; though no act of buying or selling during the time of the partnership can be established in evidence.

1819.

PARKER

v.

BARKER.

between the 22d of *March* and the 9th of *May*. The jury found a verdict for the Defendant.

Cross Serjt. now moved to set aside the verdict and have a new trial.

DALLAS C. J. I think this was not only a question to go to the jury, but that the jury have properly decided. Here is an acknowledgment by the Plaintiff of his having been a partner with *Greenwood*. He gives orders respecting the goods deposited by him for some operation, thereby associating himself with *Greenwood*. The acknowledgments of his being a partner with the latter, are evidence of his being associated in those acts of trading, for the purpose of which the partnership subsisted.

PARK J. This was evidence to go to a jury, and the jury have found a verdict perfectly right.

BURROUGH J. *Greenwood* was in trade, and that was sufficient, the Plaintiff having adopted his trade.

RICHARDSON J. assented.

Rule refused.

1819.

DOE, ex dem. PRICHTT v. MITCHELL.

May 1.

EJECTMENT. At the trial before *Burrough J.* at the *Wartick Spring Assizes*, 1819, it appeared that the lessor of the Plaintiff and his brother were tenants in common of certain property devised to them by an uncle; that they had agreed that this property should be divided, and that the lands for, which the present ejectment was brought, should be taken by the lessor of the Plaintiff as his share. Subsequently to this agreement, but before the deed of partition was executed, the lessor of the Plaintiff distrained on the Defendant, who then paid the whole rent to the lessor of the Plaintiff alone; the lessor of the Plaintiff alone gave the Defendant due notice to quit, and this notice was given after he had agreed with his brother for the partition, but before the deed of partition was actually executed. The Defendant had heard that a division was to take place. *Burrough J.* was of opinion that the payment of the whole rent to the lessor of the Plaintiff, on the occasion of the distress, amounted to an attornment to him for both moieties, and directed the jury to find for the Plaintiff for the whole, which they did accordingly.

A. and B., tenants in common, having agreed to divide their property, and that *Blackacre* should belong to *A.*; the occupier of *Blackacre*, who, after this agreement, had paid his whole rent to *A.*, cannot, in an ejectment brought against him by *A.*, object that the partition deed between *A.* and *B.* is not executed.

Copley Serjt. now moved to set aside the verdict, on the ground, that the lessor of the Plaintiff, as tenant in common with the occupier, who claimed one moiety under the Plaintiff's brother, was not entitled to bring ejectment till the partition deed had been executed.

DALLAS C. J. The Defendant, by paying the entire rent under the distress, admits the title of the lessor of the

1819.

DOR, dem.
PRICHTT,v.
MITCHELL.

the Plaintiff, and he cannot afterwards dispute it. He has nothing to do with the partition deed, and cannot take advantage of its being incomplete.

RICHARDSON J. The tenant had ample notice to quit, and was sufficiently informed that a division had taken place.

The rest of the Court concurring, the

Rule was refused.

May 5.

BRACEBRIDGE v. JOHNSON.

If a *capias ad respondendum* be directed to the chamberlain of the county palatine of Chester, commanding him to take the Defendant, it is irregular, and the Defendant may take advantage of such irregularity.

THE Plaintiff had issued into the county palatine of Chester a writ of *capias ad respondendum* against the Defendant, directed to the chamberlain of the county palatine of Chester, or his deputy, and commanding him to take the Defendant. Writs of *capias* issued into the county palatine of Chester are usually directed to the chamberlain of the county palatine, and command him, that, by the king's writ under the great seal of the county palatine, to be duly made, and to be directed to the sheriff of the said county palatine, he the chamberlain should command the sheriff that he take, &c.

Blossett Serjt., on a former day, had obtained a rule nisi to quash the writ in question, and set aside all subsequent proceedings, on the ground that the chamberlain had no authority to take the Defendant, but ought to have directed another writ to the sheriff for that purpose.

Lens

Lens Serjt. now shewed cause against the rule, and contended, that the writ in question, though, strictly speaking, irregular, was irregular only in point of form; that this informality might indeed be taken advantage of by the person invested with the palatinate, but not by the parties to the suit. After citing *Jackson v. Hunter (a)*, he likened this to the case of an arrest within the verge of the king's palace, which would be valid as against the party arrested; though the king, if he pleased, might visit such an infraction of his prerogative.

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BURNBOUGH J. In that case the writ at least is regular.

Per Curiam. The writ in this case is clearly irregular; the party to whom it is addressed having no authority to arrest the Defendant. This renders the writ void, and the party to the cause may, of course, make the objection.

Rule absolute.

(a) 6 T. R. 72.

PHILPOTTS and Wife v. REED.

May 7.

PREVIOUSLY to the year 1818, the Defendant had carried on business as a trader at *Newfoundland*, and in that year he had been there declared insolvent, under the statute 49 G. 3. (a) and had duly obtained his certificate, according to the provisions of

A certificate obtained in *Newfoundland*, under the 49 G. 3. c. 27. s. 8., does not entitle the Defendant to be discharged on entering a common appearance, but must be pleaded in bar.

(a) 49 G. 3. c. 27. s. 8.

of

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of that act. In *March*, 1819, he was arrested in *England*, for a debt contracted before his discharge under the above act. On a former day *Copley Serjt.* had moved that the bail-bond in this case should be delivered up to be cancelled upon the Defendant's entering a common appearance, on the ground that the certificate granted by the Court in *Newfoundland*, was, by the statute, pleadable in bar in that island and *Great Britain*; so that the party was entitled to the same benefit as he would have been if the bankruptcy had happened in *England*.

Lens Serjt. now shewed cause, and contended, that the Defendant could not thus, by motion, summarily take advantage of the 49th G. 3., and so get discharged out of custody, but must plead his certificate in bar, under the express words of the act (a), which are, that "such certificate, *when pleaded*, shall be a bar to all suits and complaints for debts contracted within the island of *Newfoundland*, and on the islands and seas aforesaid, and on the banks of *Newfoundland*, and in *Great Britain* or *Ireland*, prior to the time when he or she was declared insolvent." He cited *Quin v. Keefe* (b), where the Court refused to discharge out of custody on motion, a defendant who had obtained his certificate under an *Irish* bankruptcy act. *Eyre C. J.* there said, "the ground ought to be perfectly plain where the Court is called upon to interfere in a summary way: if there is the least doubt, the party must put the matter upon record by pleading."

The Court called upon *Cross Serjt.* (who appeared for *Copley Serjt.*) to support the rule. He referred to

(a) 49 G. 3. c. 27. s. 8.

(b) 2 H. Bl. 555.

the statute 5 G. 2. (a), which enacts, that if a bankrupt be arrested after obtaining his certificate, "for any debt due before such time as he, she, or they became bankrupt, such bankrupt shall be discharged upon common bail;" and urged, that although the act on which he relied did not contain any express similar enactment, yet, that inasmuch as the bankrupt laws ought to receive a liberal construction, the 49 G. 3. ought to have the same effect.

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Per Curiam. There can be no discharge of the Defendant in this case; the certificate must be pleaded.

Rule discharged,

(a) G. 30. s. 7.

DOBSON and Others v. DEWAR.

May 6.

HULLOCK Serjt. had moved, on a former day, that the fine in this case should be amended, by substituting *John Dewar* as the name of the deforciant, instead of *George Dewar*, the name which appeared on the fine; the deforciant's name was *John Dewar*, and he had by that name executed the deed to lead the uses. One objection to granting this application was raised by the Court, on the circumstance which they observed, that throughout the deed to lead the uses the name of *John Dewar* was written upon an erasure, and they directed the case to stand over for an affidavit, explaining this circumstance of suspicion. The signature of *John Dewar* to the deed was not upon an erasure.

Where in a fine the name *George* had been inserted by mistake, instead of *John*, the Court allowed the right name to be substituted, on affidavit explaining the mistake having been put in.

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Hullock now renewed his motion, on affidavits stating that it was in consequence of a mistake that the name of *George* was at first ingrossed in the deed, instead of *John*, and that the mistake being discovered before the execution of the deed by any of the parties, the word *George* was erased throughout the deed, and the word *John* was substituted, and that all the erasures appearing in the deed were made, and the word *John* written upon them, previously to the execution of the deed by any of the parties. This preliminary objection being thus disposed of, *Hullock* shewed, secondly, that on a sale of the property by *Eliza Briant*, it was conveyed to *John Dewar*, as a trustee, to bar the dower of the wife of *Forster*, the purchaser, and that the deed was executed by all the parties; that a fine was levied to pass the interest of *Eliza Briant* (a feme covert) to *John Dewar*, and that in *Hilary* term last, a fine was levied, in which *Dewar* was Plaintiff and *Eliza Briant* deforciant; that the purchaser's instructions to his solicitor were to convey the property to *John Dewar*; that he was known, and was the person intended; that there was no such person as *George Dewar*; and that the instructions which the solicitor gave, and indorsed on the abstract, were for a fine to be levied to *John Dewar*, but, by mistake, the præcipe, concord, and fine were prepared and levied in the name of *George Dewar*.

Fiat.

1819.

WINDLE v. RICARDO.

May 10.

THIS was an action against the Defendant, as sheriff of Gloucestershire, for a false return. The first count of the declaration stated, that the Plaintiff had demanded, against *Elizabeth Baldwin*, widow, two messuages, &c. in the parish of *Mangotsfield*, in the county of *Gloucester*, which the Plaintiff claimed to be his right and inheritance, by writ of our lord the king of right. The count then set out at length the title of the demandant, the mise and award of the writ of summons "By which writ our lord the king commandeth the said sheriff, that, by good summoners he should summon four lawful knights of his county, girt with swords, that they should be before his majesty's justices at *Westminster*, in fifteen days of *Easter*, or before his majesty's justices assigned to take the assize in and for the said sheriff's county, if they should first come on *Wednesday* the first day of *April* then next, at *Gloucester*, there to take the assize in and for the said sheriff's county, according to the form of the statute, to make election of the grand assize of our said lord the king, between the Plaintiff demandant, and *Eliz. Baldwin* tenant, of two messuages, &c. in the parish of *Mangotsfield*, in the said sheriff's county, whereof the said *E. B.*, in the same court, had put herself upon the said grand assize, by praying recognition to be made, whether she had a greater title to hold the tenements aforesaid, with the appurtenances, to her and her heirs, as tenant thereof, as she then held the same, or return; that the sheriff was not answerable for the contents of such indorsement, and that the return was not false. Also, that the sheriff, being only commanded by the writ to summon the knights, was not guilty of negligence in omitting to have them sworn.

Where the sheriff returned to a writ of summons on a writ of right, that he had summoned four knights, which was according to fact, but the officer of the court, in expectation that the knights were about to be sworn, had, before the return, written on the lower part of the same instrument that the were duly sworn, which was not true, in an action on the case against the sheriff for a false return, and for negligence in not causing the knights to be sworn, Held, that the indorsement by the officer was no part of the

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whether the said Plaintiff had title to hold the same tenements, with the appurtenances, as he demanded the same. And that the said sheriff should have there the names of the summoners of the knights so by him the said sheriff to be summoned, and of the persons who should be by them elected, and that writ." The delivery of this writ to the sheriff was then averred, that the Defendant, intending to injure the Plaintiff, &c., did not summon four knights to be before the justices assigned to take the assize, &c., and only summoned the said knights to be before his majesty's justices at the day and place in the said writ of summons in that behalf mentioned; and though afterwards, on the 1st day of *April*, the assize for the said county was taken at *Gloucester*, the said four knights were not before the justices so assigned as aforesaid, to make election of the said grand assize as aforesaid, and no election was made thereof; that the Defendant so being sheriff, further contriving, &c., afterwards falsely and fraudulently returned to the court of our said lord the king of the bench at *Westminster*, that four knights were sworn in court, at *Gloucester*, in the county of *Gloucester*, on the 4th day of *April*, 1818, according to the exigency of the writ of summons; but the defendant had not the names of any persons elected by the said knights, as, by the writ of summons, he was directed, at the return thereof at *Westminster*; by means whereof the Plaintiff had been delayed and put to expence in suing out the writ, in trying to procure the same to be executed, in giving notice of trial, and countermanding the same, and renewing retainers to counsel in the action; consulting counsel respecting the return; suing out another writ of summons, and prosecuting the same; and shewing cause against a rule obtained by the Defendant for quashing the return. There were five other counts containing averments, varying in

some respects; but all except the fifth alleged a false return. The fifth count set out only the writ of summons, and merely averred, that through the negligence and improper conduct of the Defendant, his under-sheriff, and bailiffs, no election of the grand assize was made. At the trial before *Dallas C. J.*, at the sittings at *Westminster*, after *Hilary* term, 1819, it appeared, that the commission-day of the *Gloucester* assizes, 1818, was the 1st of *April*; that the writ of summons was duly delivered to the sheriff, and four knights were summoned by him in the town of *Gloucester*, on the 2d of *April*. They all promised to attend, but at the time when the officer called for them, and was prepared to administer the oaths, three of them only appeared; and in consequence none of them were sworn. The sheriff made a return as follows: "By virtue of this writ to me directed, I have caused *Edward Wilbraham*, *Henry Hicks*, *William Veel*, and *William Goodrich*, four lawful knights, girt with swords, to be summoned by *Thomas Lane* and *Samuel Lane*, my bailiffs, to be before his majesty's justices, at the day and place within mentioned, to do as by this writ I am commanded; and the said summoners are and each of them is mainprized by *John Doe* and *Richard Roe*. The answer of *David Ricardo*, sheriff." On the back of the writ, stood, at the time when the sheriff made his return thereon, the following indorsement. "The above named four knights were sworn in court, at *Gloucester*, in the county of *Gloucester*, the fourth day of *April* 1818." This indorsement had, before the knights were called to be sworn, been made by the officer of the court, on the application of the agent for the under-sheriff, in the expectation that the knights, on being called, would forthwith be sworn. The practice of the judge's officer was, to sign, with the initial letters of his name, a memorandum to the effect above stated, after he had administered the oaths; and he had written this in-

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dorsement in preparation, expecting that he should administer the oath and have occasion to sign it. The learned judge intimated his opinion, that this indorsement was no part of the sheriff's return; that the sheriff's duty was to summon the knights, which duty he had fulfilled; that it was no part of the sheriff's duty to return that the knights had been sworn; and that there was no evidence of negligence: for it appeared, that the knights had been summoned, and were present. He however allowed a verdict to be taken for the Plaintiff, with liberty to the other side to move to enter a verdict for the Defendant.

Lens Serjt., on a former day, had accordingly obtained a rule *nisi* to set aside the verdict for the Plaintiff, and to enter a verdict for the Defendant.

Vaughan Serjt. now shewed cause, and contended, that the sheriff was bound to make a true statement of the fact, instead of which he had made a false return; he should have returned that the four knights did not appear to be sworn, but he had, in fact, returned that they were sworn; for the indorsement must be considered as a part of his return. The demandant could have no knowledge of what passed at the assizes, except through the means of the sheriff; and it must be taken, that he has sanctioned whatever he has allowed to appear on the back of the writ, where his name was signed; and although it was not his duty to swear the knights, yet, inasmuch as he takes on himself to aver, that they were sworn, he has made himself answerable for the accuracy of the statement. At all events, the Defendant was liable for the negligence complained of in the fifth count of the declaration. The sheriff was ordered to summon the knights to appear on the 1st day of *April*, but the summons was not put into the hands of the bailiff till the 2d; so

that the Plaintiff could have had no remedy against the knights; for had he proceeded against any of them for non-attendance, the want of regular notice would have been a complete defence.

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Lens Serjt., in support of the rule, was stopped by the Court.

DALLAS C. J. It appears to me, that there is no ground whatever for this action; and considering the facts which have been disclosed, it ought never to have been brought. This is an action against the sheriff, not for an insufficient, but for a false return; and to entitle the Plaintiff to damages, it was necessary to shew, that the return was false. Let us, therefore, see what the writ prescribes; if the sheriff has done that, his duty ends. The writ orders him to summon four knights, and if he has done that, he has done all that was required of him. If he had, in point of fact, falsely returned that these knights were sworn, such a return would not have been material; and therefore, even though it had been false, no action would have lain. But he has not so returned. He has returned, that he caused four knights to be summoned, and this was done. After his signature was affixed to this, the officer of the court, with proper diligence, makes an indorsement of that which he thought would be done; and the matter of this indorsement is immaterial to the return. This instrument, therefore, contains a good return made by the sheriff to the matters, which, by the writ, he is required to return; and he is not responsible for the accuracy of the indorsement. Next, as to the allegation of negligence; the writ commands the sheriff to have four knights at the assizes. Instead of putting the parties to the expense of sending summoners round the country, it was better to wait till the grand jury were assembled. We

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find that four knights were in fact summoned, and consented to appear; that they did not appear, was not occasioned by the default of the sheriff; he took the proper course; and there is no ground whatever for any complaint against him.

PARK J. I am glad to be of the same opinion with my Lord; this is a most vexatious action. The sheriff is to return four knights: he returns "I have summoned A. B. C. and D. by E. and F. The sheriff's signature is above the indorsement, not subscribed to it. The sheriff has nothing to do with their swearing; the only persons who have any thing to do with it, are the Judge and his officer; and if any action should be brought, it should be brought against the officer. The other ground is equally untenable; and I think there is no reason to give the Plaintiff a verdict. It is the usual course to serve the notice after the first day.

BURROUGH J. It is well known that the sheriff's return is that only to which he puts his name, when he returns the writ; any thing else which may appear on the same parchment is no part of it. If the doctrine were to prevail, that this summons could not be served after the first day of the assizes, then no *subpoena* could be served on a witness, after the commission day. The whole duration of the assizes is in law but one day; the substance of the summons is, that the party summoned appear at the assizes; the mention of the day on which the judges are to come, is directory, to instruct the sheriff when the assizes are to be. It does not appear that there is any ground whatever for the action.

RICHARDSON J. concurred.

Rule absolute.

1819.

CURRIE v. KINNEAR.

May 11.

THE Defendant had been arrested upon a *capias* returnable in fifteen days of *Easter*, and the rule to bring in the body expired on the 8th of *May*. The Defendant had lately been committed, by the Court of King's Bench, to the custody of the keeper of *Newgate*, for certain alleged conspiracies committed by him in company with others, and was there detained, in order to be brought up for the judgment of the Court of King's Bench. Bail above had been put in, for the Defendant, with the filacer of this court, which had been excepted against. Under a writ of *habeas corpus* the Defendant was, on the 5th of *May*, brought up in custody of the keeper of *Newgate*, before a Judge at chambers, to the intent that he might be rendered in discharge of his bail: the learned Judge declined to interfere, whereupon *Onslow* Serjt. on a former day had obtained a rule *nisi* for enlarging the time for the justification of the bail, or for their surrender of the Defendant.

This Court will not interfere to take a party out of the criminal custody of the Court of King's Bench, in order to surrender him in discharge of his bail.

Vaughan Serjt. now shewed cause, and endeavoured to distinguish this case from that of *Hodgson v. Temple (a)*, which *Onslow* had cited when he obtained his rule; observing that there the bail had been justified, whereas in the case before the Court they had been excepted to. But,

Per Curiam, This Court cannot interfere to take the Defendant out of the criminal custody of the Court of King's Bench.

Rule absolute.

(a) *Ante*, v. 503. S. C. 1 *Marshall*, 166.

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May 11.

ADAMS v. HUGHES and DANCER.

The Defendant, having been served with common process, collared and violently shook the officer, and ordered him to quit his presence : Held, that, without disclosing more of the circumstances, this did not necessarily amount to a contempt of the Court and obstruction of its process, for which they would grant an attachment.

A SHERIFF's officer served the Defendant, *Dancer*, with a copy of a writ of *capias ad respondendum*, explained to him the notice there-under written and the intent of the service, and showed him the writ, whereupon the Defendant *Dancer* collared him, shook him violently, and ordered him to quit his presence. Upon these facts, *Vaughan* Serjt. had, on a former day, moved for an attachment against the Defendant for a contempt of the process of the Court, who desired him to obtain an affidavit, pointing out more fully in what respect or degree the acts of violence complained of obstructed the due execution of the process of the Court. On this day, *Vaughan*, not being able to add any thing to the circumstances above stated,

The Court said, they would lay down no rule, whether every collaring and shaking of an officer, however improper such conduct were, should or should not be deemed a contempt of the Court, it sufficed to say, that no case was here shown to the Court which disclosed any such obstruction of their process as to call for this summary mode of punishment.

Rule refused.

1819.

THOMPSON V. PEARCE.

May 11.

THIS was an action brought against the Defendant, upon the stat. 22 G. 3. c. 45., the first section of which enacts, "That any person who shall directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole, or in part, any contract, agreement, or commission, made or entered into with, under, or from the Commissioners of his Majesty's Treasury, or of the Navy or Victualling Office, or with the Master-General or Board of Ordnance, or with any one or more of such Commissioners, or with any other person or persons whatsoever, for or on account of the public service, or shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract, or commission, which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time that he shall execute, hold, or enjoy any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same." The ninth section enacts, "That if any person hereby disabled, or declared to be incapable to sit or vote in Parliament, shall nevertheless be returned as a member to serve for any county, stewartry, city, borough, town, cinqueport, or place, in Parliament, such election and return are hereby enacted and declared to be void; and if any person disabled and declared incapable by this act to be elected, shall,

A clothier who contracts with the colonel of a regiment to furnish the regiment with army clothing, is not thereby incapacitated by stat. 22 G. 3. c. 45. from being elected as a member to serve in parliament.

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shall, after the end of this present session of Parliament, presume to sit or vote as a member of the House of Commons, such person so sitting or voting shall forfeit the sum of 500*l.* for every day in which he shall sit or vote in the said House, to any person or persons who shall sue for the same in any of his Majesty's Courts at Westminster, and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said Courts by any action of debt, &c." The tenth section enacts, "That in every such contract, agreement, or commission, to be made, entered into, or accepted, as aforesaid, there shall be inserted an express condition that no member of the House of Commons be admitted to any share or part of such contract, agreement, or commission, or to any benefit to arise therefrom; and that in case any person or persons who hath or have entered into or accepted, or who shall enter into or accept any such contract, agreement, or commission, shall admit any member or members of the House of Commons to any part or share thereof, or to receive any benefit thereby, all and every such person and persons shall for every such offence forfeit and pay the sum of 500*l.*" At the trial at the *Middlesex* sittings after *Hilary* term 1819, before *Dallas* C. J., it appeared that the Defendant was an army clothier; that *Cox* and *Greenwood*, as agents for General *Nichols*, who was colonel of the 66th regiment of foot, applied to the Defendant on the 6th of *June* 1818, being directed so to do by General *Nichols*, "immediately to provide, on his account, the articles of clothing specified in the order, for the use of the 66th regiment of foot, and to deliver the same to the packers, Messrs. *Hayter, Howell, and Co.*, and to state the date and number of that order in the Defendant's annual account against the said regiment, which they begged might be transmitted to them as soon as possible

possible after the 24th *December* then next, with the certificate written thereon, and signed by the officer commanding, if the regiment should be then in this country, or if abroad, by the packers, specifying that the whole of the articles therein charged were received, and at what dates. They apprised the Defendant that inconvenience had frequently arisen, and additional expenses to the Colonels had been incurred, from clothing and appointments having been supplied by tradesmen without the regular authority; and requested that no article whatever, chargeable to the Colonels of regiments in their agency, might be furnished by the Defendant without a proper order being first obtained for that purpose." On the 18th of *June* 1818, the Defendant had been elected a burgess to serve in parliament for the borough of *Devizes*, and on 31st *July* following, he supplied, solely in pursuance of the above order, the articles therein mentioned. The clothing was paid for by the agents for the Colonel, whose duty it is to clothe the regiment, and a part of whose emolument is derived from the surplus of the money allowed by Parliament for clothing the regiment, if any remains after such clothing is provided: the army clothier looks only to the Colonel, and has nothing whatever to do with the public. *Dallas C. J.* was of opinion that this was not a dealing on the part of the Defendant with the Government, but exclusively with the Colonel of the regiment, and directed a nonsuit to be entered; but considering this a question of great moment, he reserved liberty to the Plaintiff to move to enter a verdict for 500*l.*

Laws Serjt. on a former day, had accordingly obtained a rule nisi to set aside the nonsuit, and to enter a verdict for the Plaintiff for 500*l.*

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Lees and Taddy, Serjeants, now shewed cause. The very words of the evidence form the best comment on this case: the Colonel is no contractor with Government. The statute points to those cases wherein there are written contracts; and it is provided that every such contract shall contain an express stipulation, that no member shall be admitted to a share of it. This demonstratively shows, that the Legislature never contemplated such a course of dealing as the present. The Colonel is supplied with money to enable him to clothe his regiment: he is not bound by any contract to supply the clothing. If he neglects to clothe his regiment, the Government will not call upon him for a breach of contract, but for a breach of his duty. This contract, attempted now to be brought within the scope of the statute, is merely a contract between the Colonel on the one side, and the Defendant the clothier on the other, by the intervention of the army agent. The Colonel is personally responsible to the clothier; and if the clothier fails, the loss must fall on the Colonel, for he must clothe his regiment. But the evidence goes farther; it shows that the Colonel derives an emolument from this transaction; and he gets this, not by virtue of any contract, but as part of his office. If a soldier deserts with his clothes, the loss must fall on the Colonel. The Colonel may clothe his regiment without the intervention of an army clothier: if he will, he may himself employ every tradesman who supplies every part. Whether the order goes through one or more agents, it is still a question of agency. The words, "or with any other person or persons whatsoever, for or on account of the public service" (a), must be restricted to contracts *quodam generis*, viz. those which are made with the officers specially named immediately above "the Commissioners of his Majesty's Treasury, or of the Navy or Victualling Office,

(a) Sect. 1.

or with the Master-General of the Board of Ordnance, or with any one or more of such Commissioners." If it could be contended that the providing of clothing was at all "a commission" given by the Crown to any person, it could be considered only as a commission given to the Colonel; and the act applies, if at all, to show that the Colonel cannot sit in Parliament. If he is brought within the scope of the act, it cannot be carried below him, without adopting a principle which would carry it below him to every one of the tradesmen employed in succession. The army clothier, at least, is not within the act, even if the Colonel comes within it; for the clothier has no communication whatever with Government. But the Colonel himself is no agent of Government: no option resides with the Colonel whether he shall or shall not supply the clothes, for it is part of his duty to supply them. Giving the fullest interpretation to the words of the statute, it could have been intended to apply only to contractors, in the ordinary sense; but such a case as this comes not within the contemplation of the legislature. One of two lines must be adopted: either the act must be confined to those immediately concerned in the contract, or extended to all those, who are engaged in making up the various materials. In construing an act, the first thing to consider is the nature of the act, whether it be remedial or penal. This act is highly penal, and the Court will construe it strictly. Its object is to disqualify all persons coming immediately in contact with government; such as those who deal with the different public boards, and who might therefore, with the greater reason, be supposed to be under the influence of government.

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Lives Serjt., contra, It has been objected, that this case is neither within the letter or spirit of the act of parlia-

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parliament, inasmuch as that relates only to contracts with government, and not to contracts with private individuals; and that General *Nichols* was acting in his private capacity. Whether he did act in his private capacity or not, will make no difference; for this statute is a general law, applicable to contracts made by any person with any person, so as the contract ultimately is for the public service. As to the objection, that the contract is not in writing, the answer is, although the last section requires, that in every such contract there shall be the condition, that no member of the House of Commons shall be admitted to a share thereof; yet that clause is merely directory. It would be fraught with mischief, if this objection were to obtain. The statute would always be evaded, by having the contracts not in writing, and so would be made a dead letter. The objection that the statute applies only to contracts immediately with the government, but not remotely, is over nice. The object of the statute is to prevent undue influence; and though it has been broadly said, that the statute points solely to a contract entered into with the government, and has always been so understood, no authority is cited to support that proposition. The colonel, who is, *ex necessitate*, called upon to clothe his men, cannot, it is true, be an offender within the meaning of this law: how then, it is said, would the statute affect the more remote contractors? The answer is, they certainly would be affected equally with the army clothier; for the possibility of influence has been looked to by the legislature with becoming jealousy. With regard to the letter of the act, it is admitted to be general. The title is, "An act for restraining any person concerned in any contract, commission, or agreement, made for the public service, from being elected, or sitting and voting as a member of the House of Commons."

There

There is no distinction of contracts; the words are, "any person," "any contract." The enacting part of the first section is, that "any person who shall directly or indirectly, &c." These words "directly or indirectly," must be considered as overpowering the nice objection, as to the nearness or remoteness of the contracting party. With regard to the parties, therefore, nothing can be more general. It is then objected, that commissioners of the treasury, &c. being mentioned, the parties contemplated by the legislature are specifically enumerated, but *non constat*, that because they are specifically mentioned, the act is so to be construed as to confine its operation to these persons only. They are put, indeed, as instances, but the clause proceeds with the words "or any other person or persons whatsoever." Would it not be absurd to say, that those who contract with parties specifically enumerated, should not sit in parliament; but that those who contract with parties not enumerated, should sit. Can any thing be more of a public nature than a contract for clothing the army. In what situation do colonels of regiments stand? It is admitted, that they are persons by whom the service of clothing the men is done, and that they are furnished by government with funds for that purpose; in exactly the same situation stand the commissioners of the navy and other boards; they too are furnished by the government with funds, which it is their duty, as it is that of the colonels, to apply for the public benefit. Here the contract is between the colonel and the army clothier, for the benefit of the public. In the third section, it is provided, that the act shall not extend to incorporated trading companies; in the seventh, that members holding contracts may be discharged therefrom, on giving twelve months notice to "the person or persons with or from whom such contract, &c. is made." Here is no mention of commissioners

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sioners of the navy, &c. If the first part of the statute applies only to public characters, these words clearly shew, that the statute is levelled at any one who may contract, in whatever capacity he may be. It is said, that this is a private contract between *A.* and *B.*; but they are only the nominal parties; the real parties are the public and the army clothiers. The general is acting for the public, and he is not liable; no action would lie against him for the clothing. It is his duty to see the regiment clothed, and that duty is a public duty, and does not draw after it personal and individual responsibility. *Macbeath v. Haldimand* (a), *Unwin v. Wolsely* (b), *Rice v. Chute* (c), *Rice v. Everett* (d), *Myrtle v. Beaver* (e). What is the principle of these cases? from *Macbeath v. Haldimand*, downwards, that the parties were all acting for the public service. That principle applies to the present Defendant equally as to General *Haldimand*. This case comes within all the mischief of the statutes, the words of which are general; there is nothing to restrain them, and this action is maintainable, inasmuch as the Defendant is substantially a person contracting with government, and clearly within the meaning of the act.

Lens observed upon the cases cited on the other side, that they strengthened the principle which he had laid down. In the case before the Court, no responsibility existed as between the government and the contractor.

DALLAS C. J. This is an action brought to recover penalties, amounting, on the face of the declar-

(a) 1 T. R. 174.

(b) 1 T. R. 674.

(c) 1 East, 579.

(d) 1 East, 583. n.

(e) 1 East, 135.

ation to 8000*l.*, though narrowed by the verdict to one penalty; leaving the Defendant liable, if liable at all, to the penalty of 500*l.* for sitting and voting in parliament. It is now thirty-five years since the statute passed, on which this action is brought; during a very great part of which period, the country having unfortunately been at war, it has been necessary to keep up a great standing army. This necessity has led to extensive contracts for clothing that army; and although, during this period, there have been many general elections, yet it never has occurred to any one to raise the objection now before the Court, till this action was brought. I do not mean to say, that if the law be clear, this circumstance would be of any avail; but it serves to shew the general understanding of the profession during so long a time; and, in general, the silence of *Westminster Hall*, when considered with relation to questions of this importance, has been considered as of some weight. It will be necessary to review the circumstances of the case. What then are the facts? General *Nichols* receives an order from government to clothe his men, he makes a contract with the clothier. I put a question to the Plaintiff's counsel, whether it was intended by the act that colonels of regiments clothing their men should be incapacitated from sitting in parliament? to which it was distinctly answered, that it was not so intended: so that the Plaintiff's argument is of this preposterous nature, namely, that though General *Nichols*, whose duty it is to clothe the men, is not disqualified; the army clothier, whom General *Nichols* employs to execute his order, is disqualified. The order, as established by the evidence, is an order received from General *Nichols*, without any reference whatever to government. The terms of this order are, "We are directed by General *Nichols*, to request you

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will immediately provide," on account of whom? on account of government? No; but "on his account." The order which the Defendant has executed, is the order of General *Nichols*; General *Nichols* is debited in the Defendant's books, to the amount of the order. The Defendant receives nothing from government, he never looks to government for the payment of a farthing; he looks only to General *Nichols*. How can the clothier know what passes between government and General *Nichols*? The clothier is paid, not by government, but by the person, who has given him an order in his trade and business; and this extraordinary position is made, that because these are articles which have application to the public service, the tradesman is disqualified as a contractor with government. Let us see how far this argument would go! The army clothier employs the tailor, the draper, the button-maker, and the lace-maker under him; and they employ subordinate persons under them. Every thing, which each of these parties furnishes, has an application to the service of the public; and all of them, according to this comprehensive argument, would be considered as contractors with the public, and so be disqualified from sitting and voting in parliament. I cannot think that such was the intention of the act; and am therefore of opinion that it is impossible to consider the Defendant's case as falling within this statute.

PARK J. The object of this statute has been truly stated to be the prevention of an undue influence, by means of contracts entered into, with whom? certainly with the commissioners named in the first section, "the commissioners of his Majesty's treasury," and other commissioners therein named; the subsequent words, "or with any other person or persons whatsoever," must

must mean other persons of similar situations; for, one half of the commissioners and officers of government are not enumerated. It would be impossible to contend, that every thing, which, however remotely, has a relation to the public service, disqualifies the dealer from sitting in parliament. It appears from the evidence, that the whole of the articles in this case were furnished on the sole account of General *Nichols*. The cases cited in the argument for the Plaintiff, prove the very principle on which the Court is proceeding. In *Macbeath v. Haldimand*, *Wolesty v. Umwin*, and *Rice v. Chur*, the Defendants were the mere agents of government, and were not contracting on their own account; but this is not at all the case of a contract with the government itself: and I am of opinion, that the rule must be discharged.

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BURROUGH J. I am of opinion, that this is not a contract with government, or with any person immediately employed on behalf of the government. The act is meant to apply to all then existing boards, and to any other similar boards which should thereafter be created; and many such have since been created. The tenth section is stronger than I at first thought it; for every contract with these boards must be in writing; their accounts could not otherwise be passed; and parol contracts would lead to infinite frauds. I have known many actions successfully brought against colonels of regiments, for the price of clothing furnished to those regiments. The clothier's profit does not lie in the price of each individual article, but in the cutting out of so many; he having all the cloth in his hands; but what remains of the cloth, after the cutting out, is not the property of government but of the clothier. What influence then does this contract give the government over him in the House of Commons?

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The colonel makes the best contract he can ; he spends as little money as he can, and puts the surplus into his pocket. One clothier will make a harder bargain than another, but none of them act for the profit of government, but for the profit of themselves ; nor do such contracts give government any influence over them. Both the words and the meaning of this act of parliament are, in my opinion, adverse to this action.

RICHARDSON J. I am of the same opinion. If it could be considered that General *Nichols* were a contractor with government within the meaning of this act, I should still think that the Defendant, as a sub-contractor, is not liable to the penalties imposed by this statute. The act can only extend to those who come immediately in contact with government ; if it were otherwise, a large proportion of competent persons must, in time of war, be excluded from sitting in parliament. Suppose the transport board enter into a contract for ships to convey troops. The owner of each of these vessels must contract with the ship-chandler for the various articles necessary for their equipment ; could it be contended, that the ship-chandler and all whom he employs would be excluded by the operation of this act ? At such a season, large quantities of arms are necessarily contracted for ; would the iron manufacturers of *Birmingham*, if elected to serve in parliament, be subject to these heavy penalties ? It would be impossible to draw any line, if all sub-contractors are to be excluded from sitting in the House. But if General *Nichols* is not to be considered as contracting with government, it would be monstrous to say, that such persons as the Defendant fall within the meaning of the act. The words of the statute, might, indeed, by possibility, apply to persons, whose name is not contained in the
 original

original contract with government. If, for instance, a party were to buy the interest in a contract, he might be considered as a person contemplated by the act; but the general words "other persons" must mean other persons acting as the agents of government. The Defendant has no participation in the profit or loss of General *Nichols*, but is entitled to be paid by the General, according to the terms of his agreement.

Rule discharged.

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May II.

REPLEVIN for goods. The Defendant avowed, for six months rent, due the 29th of *September*, 1818. The Plaintiff pleaded, that he, on the 23d of *March*, 1812, and from thence to the 1st of *May*, 1818, held the dwelling-house in which, &c., as tenant thereof to the Defendant, upon the terms mentioned in the avowry (a); and that on the 25th of *March*, 1812, the sum of 2l. 5s. 6d. became due for the land-tax before then assessed upon the said dwelling-house; and that after that sum had become due, and before the said time when, &c. the Plaintiff being the tenant and occupier of the dwelling-house, in order to prevent his goods therein from being distrained on that day and year, paid the sum so due. [There was a similar statement for the half years ending the 29th of *September*, 1812, and the 25th of *March*, 1813, and then a similar statement for the years ending respectively the 25th of *March*, 1814, 15, 16, and 17: the plea then proceeded.] That on the 24th of *March*, 1812, and on divers other days, between that day and the 1st of *May*, 1818, divers sums

An allegation of payment of land-tax and paving-rates due for any period preceding the current year, is no plea in bar to an avowry for rent arrear.

If the land-tax and paving-rates are not deducted, (as they ought to be,) from the rent of the current year, they cannot be deducted, or the amount of them be recovered back, from the landlord in any subsequent year.

(a) The usual terms of paying rent quarterly.

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of money, amounting in the whole to 32*l.* 10*s.*, became due for rates for paving certain streets and lanes within the parish of *St. Saviour, Southwark*, by virtue of the statute in that case made, being before the several last-mentioned times assessed and charged upon the said dwelling-house; part of which rates, to wit, 7*l.*, ought to have been paid by the Defendant, as owner of the said dwelling-house. And that before the time when, &c. the said sum of 7*l.* being in arrear and unpaid, the Plaintiff was, as tenant and occupier of the house, duly required, according to the form of the statute, to pay the same; and, therefore, in order to prevent his goods, being in the dwelling-house, from being distrained, the Plaintiff, when he was so required, paid the sum so in arrear from the Defendant, as owner of the dwelling-house; that the several sums of money so paid by Plaintiff, amounted to 30*l.* 9*s.* 7*d.*, and that the same exceeded the amount of the rent in the avowry alleged to be due from the Plaintiff to the Defendant. Demurrer and joinder: and the question upon these pleadings, was, in substance, whether, if the tenant omits to deduct out of the rent of the current year, payments made in respect of the land-tax and paving-rates, he is entitled to deduct the amount of them out of the rent of any subsequent year.

Taddy Serjt. in support of the demurrer. The plea is ill, being in substance a set-off; although the word set-off is not mentioned; and the language at the end, "that the sums paid greatly exceed the amount of the rent due," is the form used in every plea of set-off. A set-off, however, cannot be pleaded in replevin. But whatever may turn on this, the consideration of the general land-tax act (*a*) will settle the question raised

(*a*) 38 *Geo. 3. c. 5. s. 17.*

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on this record; the clause (a) which allows the tenant to deduct the land tax out of his rent is as follows. "And the several and respective tenant or tenants of all houses, lands, tenements, and hereditaments which shall be rated by virtue of this act, are hereby required, and authorized to pay such sum or sums of money as shall be rated upon such houses, lands, tenements, or hereditaments, and to deduct out of the rent so much of the said rate, as in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to pay and bear. And the landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments, upon receipt of the residue of the rents." The act in question, being an annual act, and passed for the service of the current year, the rent expressed in the act, must mean the rent of the current year; all the expressions of the act have reference to that year, and so must the charges imposed by it; for it could not with certainty be anticipated, that there would be the same charge in a subsequent year, or any authority for the future, to affect future rents. In *Denby v. Moore* (b), the tenant having paid rent for a long time, without deducting the property-tax, brought an action against his landlord for money had and received; and the Court held, that the action would not lie. In that case, the act (c) had authorized the tenant to deduct the property-tax out of the first payment of rent to be thereafter made; and the deduction not having been made, the Court considered the payment of the entire rent a voluntary payment, made with full knowledge of the right to exemption. The argument used in that case, that if it had been

(a) C. 5. s. 17.

(b) 1 Selw. & Barn. 123.

(c) 46 Geo. 3. c. 61.

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the intention of the legislature, that a tax due at any distance of time might be deducted from the rent, it would have been so expressed in the act, is equally applicable here. The legislature has used no such expression; and if the deduction can be made for more than the current year, where is the line to be drawn? The claim for a return of the sum paid in the first year, stated in the plea, is discharged by the statute of limitations. If the law were otherwise, it would subject the landlord to extreme inconvenience. For if he were a mesne landlord, he might pay the lord paramount his rent without any deduction, in ignorance that the tenant paravail had paid the tax, and could not afterwards recover back any of the money so paid to the lord paramount. The plea then is ill, inasmuch as it does not aver that the Defendant had received notice of these several payments, and also, inasmuch as it does not aver that he was liable to make them. For ought that appears on the record, the Defendant might have been an intermediate lessor, and not liable to pay the tax. The Plaintiff has, indeed, said that he was tenant to the Defendant during all the time in question; and such he possibly may have been; but it does not therefore follow that the Defendant was the person liable to pay the tax. In *Sapsford v. Fletcher* (a) (which case was very distinguishable from the present) the Plaintiff had paid the ground-rent, and stated in his plea, that the Defendant held the house for which the ground-rent was due, as tenant to the Duke of *Portland*; so that the rent could not have been due from any other person, and the Defendant must have known that it was unpaid. The mode of pleading on this record is of modern date, and cannot be traced farther back than the case

(a) 4 T. R. 511.

of *Sapsford v. Fletcher*. The principle ought not to be extended farther than it there is. That part of the present plea, which relates to the paving-rates, is differently framed; for it expressly avers, that the Defendant is liable to them as owner of the house; and in like manner it ought to have been shewn in what character he was liable to the land-tax.

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Hullock Serj., in support of the plea. A party who resists a claim founded on equity and justice, ought to shew some positive rule of law in his favour. It is admitted, on this record, that the land-tax and paving-rates had been paid by the tenant, and that they had not been paid by the landlord, and yet it is contended that the landlord ought not to discharge them. The money has been paid by the tenant to prevent a distress; it is not necessary, therefore, that the Plaintiff should aver that the land-tax was due from the Defendant; it is distinctly averred, that the Plaintiff was tenant, and if the Defendant had been an intermediate landlord and not liable, he might have replied the fact. It has been urged, that the plea is framed in different language, where it speaks of the paving-rates; but the act, which authorizes the tenant to deduct from his rent the amount of these rates, is different from the land-tax-act. The plea pursues all the precedents, whether printed or manuscript; it is a plea of payment and not of set-off, and, in all material points, agrees with the plea in *Sapsford v. Fletcher*, wherein no notice is averred. In *Taylor v. Zamira* (a), the plea averred no notice; and as the landlord was liable to pay the land-tax, and was himself bound to take notice of the time when it was due, it could not be necessary to aver notice, unless there is a positive

(a) 6 Taunt. 524.


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decision to that effect. If it be just, that the allowance of the land-tax should be made in one year, it cannot be less just that it should be made in any other year; and the unravelling of accounts can occasion no very great inconvenience between landlord and tenant, who have always an account standing. The case of *Denby v. Moore*, turned on the language of an act of parliament, which was different from the land-tax act; the property-tax being ordered, by 46 G. 3., to be deducted out of the next rent that should thereafter become due. It is true, that Lord *Ellenborough* C. J. decided that case on the ground that the payment was voluntary; but it could hardly be esteemed such, when the sum was paid under the dread of a distress: and the rest of the Court seem to have decided the case on the ground, that to allow the sums which the tenant had omitted to deduct, would lead to a direct violation and frustration of the act of parliament. The land-tax act has not, like the property-tax act, any clause requiring the tenant to deduct the tax out of the next rent thereafter payable; and is so different in its language, as to warrant altogether a different decision. Besides, the case of, *Denby v. Moore* might be sustained on the ground of the fraud upon the act, without at all affecting the decision in the case before the Court.

Taddy Serjt. in reply, observed, that for ought that appeared on the record, it might be fairly inferred, that the justice and equity of the case were with the Defendant. From the fact of the tenant's having omitted to deduct the land-tax and paving-rates out of his rent for so many years, it might fairly be presumed, that there had been some understanding, that the tenant should have the house on lower terms, on condition of his paying the land-tax. The power to deduct was not a common law privilege, but conferred by statute; and

if a party would take advantage of it, he ought, at least, to confine himself within the bounds of the authority, which enabled him to make such deduction; and the land-tax act, being only annual, could allow the deduction out of no other rent than that of the current year.

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DALLAS C. J. This is an action of replevin, to which there is an avowry for rent arrear. The plea in bar states, in substance, a payment by the Plaintiff, of the land-tax and paving-rates from the year 1812, to the time of the distress, and the amount of the several payments being more than the rent, the Plaintiff seeks, in effect, by such payments, to extinguish the rent claimed. It seems admitted, that there is no distinction between the land-tax and the paving-rates, and I shall not enquire whether this be payment or set-off. I am disposed to consider it pleaded as payment; but on this I pronounce no opinion; if a set-off, it can have no place in replevin. It is clear that the landlord was liable to pay this land-tax, and that the tenant has paid it; the question therefore is, whether the tenant should not have deducted it at the time when it was due, or, whether he can set up the amount of six years' land-tax against the last quarter's rent. The land-tax act requires three things: First, that the tenant should pay the tax; secondly, that he should deduct it; (and he is not only allowed, but required to do so), thirdly, that the landlord should allow the deduction, upon the receipt of the residue of the rent. By the common construction of these words, the tenant ought to deduct the tax out of each payment, and the landlord ought to receive the residue. So the case stands on the words of the statute. But how is the case on plain reason? Laws are adapted to common cases and common understandings, but to go on for six years in silence, and then deduct the tax for so long a period out of one quarter's rent is

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is most unusual : the inconvenience of such a construction of the act is manifest. But this case has been more extensively argued, and it has been said, that whatever be the true construction of the statute, this is a case of money paid for the landlord, which he is, without any reference to the statute, in conscience bound to allow. If the meaning of the statute be clear, then the question, whether the landlord be or be not bound in conscience to refund this money, independently of the statute, is perfectly immaterial. But is the landlord, in point of conscience, bound to allow this? How can I know that an understanding has not existed during the last six years, that the tenant should have his house cheaper, or have a longer term, in consideration of his not deducting the land-tax? Such a presumption is raised by the acquiescence of the tenant in this payment for so long a period. The plea does not allege that the payment of the tax was made before the distress, and the landlord might have every reason to think, that the tenant would go on paying, as he had done before. I cannot say that this is against conscience. The case does not resemble that of *Sapsford v. Fletcher*, which was the deduction of only a single payment for ground-rent; but it involves a most important principle recognized by the cases which I am about to cite. In *Brisbane v. Dacres* (a), where the Plaintiff sought to recover money paid under a usage held to be illegal, though there was a difference of opinion in the Court, *Gibbs*, C. J., and two other justices, held, that where a voluntary payment was made with full knowledge of the facts, the money could not be recovered. Here, in the words of that Judge, with full knowledge of the facts, and that he was entitled to retain this money out of the rent, the tenant pays the full rent and the transaction is closed. The language of *Gibbs* C. J. applies also to this case, on the broad ground of con-

(a) 5 Taunt. 143.

science and convenience: "He who receives the money has a right to consider it his without dispute: He spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money. He who has received it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment." Sir *James Mansfield* C. J. said, "I think it would be most contrary to *æquum et bonum*, if the party were obliged to repay the money back. For see how it is! If the sum be large, it probably alters the habits of his life, — he increases his expenses: he has spent it over and over again, — perhaps he cannot pay it at all, or not without great distress. Is he then, five years and eleven months afterwards, to be called upon to repay it?" If therefore the case turns on the broad ground of conscience, this is decisive. But farther, I think that the case on the property-tax act is decisive: the cases are exactly the same, excepting that in the language of one act the party is "required," in the other he is "ordered" to deduct the tax: the Court there held it a voluntary payment. Lord *Ellenborough* said, "I go on its being a voluntary payment; and I know of no principle of law which gives a right to recover back money so paid." Bayley J. said; "The payment was made at a time, when it was in the tenant's power to have deducted the sum in question. He must have known that he had a right so deduct it: knowing this, he chooses nevertheless to make this payment. Then, that is a voluntary payment, which he cannot recover back by this action." (a) It is not necessary for us to

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enter into the other ground mentioned by Mr. Justice Bayley; one is sufficient, and the case is exactly in point, and correct in principle. I am therefore of opinion, that the Plaintiff is not entitled to have an allowance of the sum he has claimed.

PARK J. I am of the same opinion; but I admit that at first I was of a different opinion, and I believe that I was a little misled by Lord *Kenyon's* doctrine. On consideration, however, I am fully satisfied. I wish not to be supposed to imply, that a set-off can be pleaded in replevin (which has been denied ever since *Absalom v. Knight* (a); nor to throw any doubt on the cases of *Sapsford v. Fletcher*, or *Taylor v. Lamira*; but this must be considered as a voluntary payment, which the Plaintiff has no right to recover back. The first case on this subject is *Bilbie v. Lumley* (b); and it is true, that in *Brisbane v. Dacres*, it is said that that case was not much argued; but whoever sees who the counsel was that argued that case, (a gentleman who never abandoned any point he thought tenable,) will see the reason of what he did. He was asked by the Court, if he knew of any case where a voluntary payment, made with full knowledge, had been recovered back. Then came *Brisbane* and *Dacres* in this Court, and lastly *Denby v. Moore*: that was a case on the property-tax act; but the effect of the two acts must be the same. In *Denby v. Moore*, several of the judges allude to the possibility of a fraud on the act; but they all concur in considering the payment a voluntary payment. It struck me as very probable in the present case, that from the tenant's long acquiescence of six years, there might have been an

(a) *Bull. N. P.* 181. *Barnes*, 450. (b) 2 *East*, 469

agreement that he should have the house at a lower rate, in consideration of his not deducting the land-tax. I am therefore clearly of opinion that the demurrer is well-founded.

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BURROUGH J. The plea in bar is bad: it is, in truth, a plea of set-off, and no other. The language used is, That the amount of the whole exceeds the amount of the rent demanded, which is the common language of a plea of set-off. I should not have said thus much, but for the purpose of protesting against a plea of set-off in replevin, which is clearly illegal.

RICHARDSON J. I am opinion, that the Plaintiff cannot by his plea in bar in this action, which is replevin, avail himself of those sums in discharge of the rent, after this long period. How does the matter stand? The tenant having paid the landlord's taxes for any given year, is supposed to have paid so much of the rent then due. Having paid 2*l*. 5*s*. 6*d*. in 1812, he ought then to have deducted it; for upon this record, he must say that all the rent is paid. He ought to have made his stand in the first year; but with his eyes open, he paid the whole rent, and therefore paid 2*l*. 5*s*. 6*d*. too much; and a person who makes a voluntary payment, with full knowledge of the circumstance, cannot recover it back. So is *Denby v. Moore*. The attempt now to deduct it, is an attempt to recover it back; for, when the law says that a man cannot recover it, it means that he cannot have the benefit of it. This is clearly a voluntary payment; and, on this ground, the decision does not trench on *Seyford v. Fletcher*, or *Taylor v. Zamira*, where the sum in dispute was deducted out of the next rent payable. What might have been the real circumstances of the case we are ignorant; but it is sufficient that this
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is a voluntary payment. Upon this principle, it appears to me that the words of the property-tax act, and the land-tax act, do not differ materially. The words "first payment," found in the property-tax act, are not found in the land-tax act; but the tenant is fully entitled to deduct the tax out of the year's rent, and ought to have done so. I will not say that, in all cases, the tenant is wholly excluded from deducting the tax, out of a subsequent year's rent. It is possible, that, in some case of mistake, he might be entitled to do so; but, clearly, he cannot do so on this record. It is sufficient to say, that the plea does not cover the whole sum claimed; and if any part is left uncovered, the plea in bar is bad. The judgment must therefore be for the avowant.

Judgment for the Defendant.

May 13.

KNIGHT v. DORSY.

After bail put in and justified, and a subsequent demand of plea, and time allowed for pleading, it is too late to move to enter an *exoneretur* on the bail-piece, on the ground, that the plaintiff has not declared on the cause of action, which he swore to in his affidavit to hold the Defendant to bail.

THE Defendant was arrested, on the 27th of *April*, under an affidavit, in debt, for the hire of a vessel. Bail were justified on the 3d of *May*. On the 4th a declaration was delivered in *assumpsit* on a contract to hire a vessel, and a breach alleged for not hiring; it contained no count for the freight or hire of the vessel. A plea was demanded on the fifth, and four days time to plead given.

Copley Serjt. on a former day, had obtained a rule *nisi* to enter an *exoneretur* on the bail-piece, and file a common appearance for the Defendant, on the ground of a variance between the affidavit to hold to bail, and the declaration. The declaration shewed that the action was not brought for the hire of a vessel actually employed,

ployed, which was the cause of action whereon the Defendant was held to bail, but to recover damages for the breach of contract, in not employing the vessel according to agreement.

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Leas Serjt. now shewed cause, and contended, that the Defendant's application came too late, under the circumstances above detailed. He cited *Chapman v. Snow* (a), where the application after plea demanded was held to be too late, though no time for pleading had been asked or allowed; and *D'Argent v. Vivant* (b), where an irregularity in the affidavit to hold to bail was held to be waived by the Defendant's putting in bail.

Copley, in support of the rule. The Defendant's application is made as early as possible: the plea was demanded on the 5th, counsel were to be consulted, and the motion was made on the 7th. In *Chapman v. Snow*, there was no variance between the declaration and the affidavit, and there had been a delay of twelve days.

Per Curiam. The Defendant is too late: he must come at the earliest moment.

Rule discharged.

(a) 1 *Bos. & Pull.* 134.

(b) 1 *East*, 330.

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May, 13.

RICHARDSON v. HALL.

The husband is not liable in an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola*.

ACTION for use and occupation of a house at *Margate*, from *Lady-day*, 1817, to *Michaelmas*, in the same year: at the trial before *Bayley J.* (*Maidstone Spring assizes 1819*.) the facts appeared to be as follow. At *Michaelmas*, 1814, the wife of the Defendant, previously to her marriage, had taken the house in question, at the yearly rent of 20*l*. She continued to occupy as tenant from year to year. At *Lady-day*, 1817, she paid the rent then due, and at the same time gave notice that she should quit at the ensuing *Michaelmas*. On the 8th of *June*, 1817, she married the Defendant, and left the house in question; but her servant remained in it a short time after the marriage. A verdict was taken for the Plaintiff with 10*l*. damages; the Defendant having leave to apply to enter a nonsuit, on the ground that the Defendant's wife ought to have been joined in the action. Accordingly,

Copley Serjt. on a former day having obtained a rule *nisi* to this effect,

Lens Serjt. now shewed cause against it. When the objection was urged at the trial, the learned Judge who presided thought the Defendant was liable in respect of privity of estate, and, if so, he ought to be sued alone. The rule is, that wherever a debt will survive for or against the wife, she may sue or be sued jointly with her husband; and for debts or engagements which the wife has fully and clearly incurred before her marriage, she is certainly liable after her husband's death. But, in the present case, the wife was never liable before marriage: the promise to pay rent was connected with the occupation of the house, and nothing could be due till the *Michaelmas*

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was after her marriage; when that period arrived, her husband was the only person answerable. If, therefore, the case rests on principle alone, the action is rightly conceived. The rent not having become due before the marriage, the wife was never liable *dum sola*: there being no cause of action till after the marriage, the wife could not have been charged if she had survived her husband; and he alone was liable. But there is an express authority on the point. *Comyn C. B.* has laid it (a) down, that for rent accruing due after coverture on a lease made to the wife *dum sola*, the husband shall be sued alone. [Richardson J. There is a difficulty from which your argument does not relieve us. This is an action for use and occupation by the husband. How do you call the occupation of the feme before marriage the occupation of the husband, or an occupation at his request, as it is stated to be in the declaration? Have you considered how the cases of *Mitchinson v. Hewson* (b), *Drue v. Thorn* (c), and *Naish v. Tatlock* (d), bear on this part of the subject?] In *Naish v. Tatlock*, it was held that an action could not be maintained against the assignees of a bankrupt, for occupation of premises by the bankrupt, unless his occupation was at the assignees' request, or they had adopted his occupation. But assignees are not liable at all in their own character; they are liable only for their own occupation, or that which they have adopted; whereas a husband, by the very act of marriage, becomes answerable for all the contracts entered into by his wife *dum sola*, and remaining unsettled at the time of the marriage. In *Drue v. Thorn*, and *Mitchinson v. Hewson*, the debt was complete and perfect in the wife before marriage, and would have remained a charge against her had she sur-

(a) *Com. Dig., Baron and Feme, (Y.)*

(b) 7 T. R. 343.

(c) *Allyn, 72.*

(d) 2 H. Bl. 320.

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vived her husband. Here the wife was married in *June*, and there was no debt due till *Michaelmas*. [Burrough J. In order even to raise the question, whether the husband could be liable for the occupation of his wife *dum sola*, the Plaintiff, in his declaration, ought to have stated the fact that the wife occupied *dum sola*, and the husband after marriage; whereas the Plaintiff has stated that the husband occupied during a period in which he had nothing to do with the premises.] His marriage makes him liable to all claims on his wife, in respect of her contracts, *dum sola*; and if the test were, that the actual occupation must always be proved to correspond with the allegation, even a joint action against the husband and wife would not lie; for where the wife had occupied during part of the time, and the husband during the remainder, there could be no joint occupation for the whole time. There must, indeed, be some occupation to make the husband liable in law; but the occupation of the wife *dum sola* is sufficient. The contract is made and in progress, and when the rent is due, the husband becomes liable. The rent cannot be apportioned: it cannot be due, in one right, up to the marriage, and in another afterwards. Besides, the occupation is a secondary object; for where a house was burnt down, and there could be no occupation, yet the party was held liable. *Baker v. Holtzaffel. (a)*

Copley and Taddy Serjts., in support of the rule, contended that the occupation was a consideration of primary importance. Where a house is burnt down, the tenant remains liable in respect of the land. The declaration in the present instance is for the occupation of the husband, and at his special instance and request; but the facts are not so, and there was no request by

(a) *Ante*, iv. 45.

the husband for the previous occupation of his wife *dum sola*. That was not an occupation by him or at his instance. Wherever there is a contract by the wife before marriage, and an action is brought after the marriage on that contract, the wife must be joined; for it does not otherwise appear how the husband becomes chargeable, and he may have no other notice of the debt. It is clear from the case of *Naish v. Tatlock*, that the occupation alleged must be proved; and if a party be sued for the occupation of another, it must be shewn that such occupation was at the Defendant's request. The cases with respect to the joinder of husband and wife are indeed in some confusion, and the rules, that, where the charges to which the wife is liable *dum sola* survive to her after the husband's death, husband and wife must be sued jointly; and that where they are sued jointly, the charge survives, do not much assist; for there are many cases in which they may join or be joined, or not, with equal propriety. The authority cited from *Comyn* only proves that a husband can be sued for rent on a lease to the wife *dum sola*, where the whole rent has accrued since marriage. But that is a case where debt is brought for rent arrear. Debt for rent lies either in respect of a contract or of the occupation, but an action for use and occupation lies for the occupation only, and the words of the statute (a) are strong to this effect; it therefore becomes material to ascertain what was held and enjoyed, and at whose request. But here was no request by the husband for the occupation previous to marriage, and it is admitted the rent cannot be apportioned.

DALLAS C. J. We think that in this case the husband is not liable in this form of action, without en-

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(a) 11 G. 2. c. 19. s. 14.

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quiring whether he would be liable in an action of a different description. This is an action given by the statute for use and occupation. The use and occupation is made the measure of the damages, and the Plaintiff can only recover to the extent of the occupation proved. What are the facts here? The demise was made to the wife at her instance and request before marriage: a great part of the occupation was by the wife before marriage, at her instance and request, and not at the instance of the husband. In *Naish v. Tatlock* the words "special instance and request" were held to be words of substance and not of form. I admit the distinction made by my Brother *Lens* between the nature of the assignees' liability and that of the husband; namely, that the assignees cannot be liable without express occupation or request, whereas the husband, by operation of law, contracts the liability of his wife without any express promise. But this, though a distinction in fact, is not in this case a distinction in principle. The words of the judgment in *Naish v. Tatlock* are, "What is given by this statute? A reasonable satisfaction for the use and occupation is the thing intended to be given; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be received; but the reasonable satisfaction, which in its own nature must apply to something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy, which in its own nature is not co-extensive with a contract for rent, nor does it seem to have been within the scope and purview of the act, to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent. The statute meant

meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. In the case now under consideration, the Plaintiff must be left to such other remedy as she may be advised to pursue: she cannot recover in an action for use and occupation, without proof of the use and occupation alleged; and if she can recover at all in this form of action, against one man for use and occupation by another (as to which we give no opinion) it must be upon the ground of that occupation having been permitted at his request, and that request must be proved." Here, the former part of the occupation is by the wife alone, and not by the husband; no request by the husband is shewn; and therefore that which is alleged has not been proved, and the Plaintiff is not entitled to recover.

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PARK J. I am of the same opinion. In the case of the house burnt down, there was still an occupation of the land; and the argument that there can be no apportionment of the rent tells for the Defendant.

BURROUGH J. There was no occupation by the husband for the former part of the half year, in fact or in law. It is true that the contracts of the wife are charged on the husband by the act of marriage, but the rent to *Michaelmas* was an entire thing, and unless the whole became due, part could not. The special instance and request is material, according to the subject-matter, and, as was held in *Naish v. Tatlock*, it must be proved here, but it cannot apply to a time at which the husband had no right and no enjoyment. The declaration here being framed as in an ordinary case of use and occupation, and not specially, the Plaintiff cannot recover. If an action of debt had been brought, the declaration might have stated in a

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plain way the facts of the case, and the Plaintiff might have recovered. In this action he cannot.

RICHARDSON J. I am of opinion that this action for use and occupation cannot be maintained. *Naish v. Tatlock* is an express authority to shew, that the remedy by action of use and occupation is not co-extensive with the action of debt for rent. The effect of that decision is, that the statute gives a collateral remedy for the actual holding in cases where it might be difficult to sustain the action of debt. In the present case, the actual occupation of the Defendant was only from the 8th of *June* till the end of the half year, therefore there was no occupation, as alleged, for the previous time. If on the 8th of *June* the wife had sold her interest, no action could lie against the vendee for her occupation; he would have been a stranger, and the husband was equally a stranger to her occupation. My Brother *Lens* distinguishes this case from that of *Naish v. Tatlock*, because the husband is liable by operation of law for his wife's contracts, while the assignees of a bankrupt are only chargeable in their own character. It is true that, generally speaking, for contracts entered into by the wife *dum sola*, the husband is jointly liable, but the occupation in this case was the same as if it had been by a stranger. No injustice is done by this decision, for the Plaintiff may find some other remedy.

Rule discharged.

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WILSON v. WELLER and Another.

REPLEVIN. The Defendants made cognizance as bailiffs of *H. Hopkins, Esq.*, a justice of the peace for the county of *Sussex*, and said that at the time when, &c., *John Crosweller* was a labourer, and at the time of his making his complaint in the cognizance mentioned, there was due to him, as such labourer, from the Plaintiff, a sum of money under the sum of 5*l.*, to wit, 3*l.* 4*s.* for wages for work and labour done by the said *J. C.* for the Plaintiff; that thereupon *J. C.* made his complaint to *H. Hopkins*, being such justice, and duly made oath before him that the Plaintiff had refused to pay to him *J. C.* the said sum of 3*l.* 4*s.*; that thereupon the said justice summoned the Plaintiff to appear before him on the 29th of *September*, 1817, at the parish of *Brightelmstone*, to answer that complaint; that the Plaintiff did appear, and thereupon the said *J. C.*, in the presence and hearing of the Plaintiff, did duly make oath and swear before the said justice, that the said 3*l.* 4*s.* was justly due to him the said *J. C.*, and that the Plaintiff had refused to pay the same, and that the Plaintiff shewed no just cause why he should not pay the same. Whereupon the said justice duly made his order in writing under his hand and seal, and did thereby adjudge, order, and determine, that the Plaintiff should pay to the said *J. C.* the said sum of 3*l.* 4*s.*, which appeared to the justice to be just and reasonable to be paid by the Plaintiff to the Defendant, as and for his wages and expenses as aforesaid, of which order the Plaintiff had due notice; that a demand of that sum was

Where the statute of labourers gives a magistrate jurisdiction to examine upon oath any servant, &c. and to make order for payment of wages to such servant, and a magistrate, in his adjudication on this act, avers a complaint made on oath, and an examination on oath, it is not competent in replevin for taking the Plaintiff's goods, for the Plaintiff to plead in bar of a cognizance made under a warrant of distress and sale founded on that adjudication, that the servant did not duly make oath before the magistrate that the sum claimed was justly due to him for wages.

2. Nor can he plead that the sum claimed was not due.

Where a magistrate has competent jurisdiction, and adjudges, and on refusal to pay issues a warrant of distress and sale, the goods taken under it are not repleviable. *Dictum per Richardson J.*

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made from the Plaintiff, but that he did not pay the same, whereupon the said justice, on the 20th of *November* in the same year, duly made and issued his warrant in writing, under his hand and seal, directed to the constable of the hundred of *Whalesbone* and his headborough, whereby, after reciting the complaint, summons, hearing, adjudication, order, notice, demand, and non-payment, he commanded the said constable and headborough to make distress of the goods and chattels of the Plaintiff, and if within the space of three days next after such distress by them made, the sum of 3*l.* 4*s.*, together with charges for taking and keeping the distress, should not be paid, that then the constable and headborough should sell the said goods and chattels, and out of the money arising by the sale thereof should pay the sum of 3*l.* 4*s.* to the said *J. C.*, returning the overplus, &c. to the Plaintiff. The Defendants then stated that they, being constable and headborough, did distrain and sell the goods; wherefore, &c. To this cognizance the Plaintiff pleaded in bar, (with a protestation in each plea, that *J. C.* was not a labourer,) first, that there was not due to *J. C.*, as such labourer, the sum of 3*l.* 4*s.* for wages for work and labour done by him in the service of the Plaintiff. Secondly, that *J. C.* did not on the 29th of *September*, 1817, duly make oath and swear before the said justice, that the said sum of 3*l.* 4*s.* was justly due to *J. C.* for wages for work and labour done by him in the service of the Plaintiff. To these pleas there was a demurrer and joinder.

Taddy Serjt., in support of the demurrer. The Defendants are entitled to the judgment of the Court upon two grounds; first, because this is not the subject of replevin. Secondly, because the determination of a magistrate on this subject is final and conclusive. As to

the first point, it is clear, that if the goods were taken by virtue of the judgment of a court of competent jurisdiction, this action does not lie. In the *King v. Monkhouse* (a), the Court granted an attachment against the under-sheriff, for granting a replevin of goods distrained on a conviction for deer-stealing, on the ground that the conviction was conclusive, and its legality not to be questioned in a replevin; and if this holds upon a conviction for deer-stealing, so will it hold in this case, which is the case of a conviction on the statute of labourers. (b) The case is therefore reduced to this question, viz. whether or no the justice had jurisdiction. It will be contended, on the other side, that the oath of the party is essential to the jurisdiction; but the whole of the different provisions of the statute (c) disaffirm this proposition. The statutes 5 *Eliz.* (d), and 1 *Jac.* 1. (e), were the parents of this statute, and no oath is necessary under them. Where the oath is introduced as essential to the jurisdiction, the statutes are express on the subject. If, then, a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party who sues, or the officer who executes the process; but where the Court has no jurisdiction of the cause, there the whole proceeding is *coram non judice*, and an action lies; as, if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the Defendant is attainted, it is *coram non judice*; but if the Court of Common Pleas in a plea of debt awards a *capias* against a Duke, Earl, &c., which by the law doth not lie against them, and that appears in the writ itself; and if the sheriff arrests them by force of the *capias*, though the

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(a) *Str.* 1184.(b) 20 *G. 2. c.* 19.(c) 20 *G. 2. c.* 19.(d) 5 *El. c. 4. s.* 11.(e) 1 *Jac. 1. c. 6. s.* 3.

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writ be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the sheriff is excused. (a) The statute 5 *Eliz.* had first passed, but that being pregnant with inconvenience, this statute enacted, " That all complaints, differences, and disputes which shall happen or arise between masters or mistresses and servants in husbandry, who shall be hired for one year or longer, or which shall happen or arise between masters or mistresses and artificers, &c. and other labourers employed for any certain time, or in any other manner, shall be heard and determined by one or more justice or justices of the peace of the county, &c. where such master or mistress shall inhabit, although no rate or assessment of wages has been made that year by the justices of the peace of the shire, riding, or liberty, or by the mayor, bailiffs, or other head officer, where such complaint shall be made, or where such differences or disputes shall arise, which said justice or justices is and are hereby empowered to examine upon oath any such servant, artificer, &c. touching any such complaint, difference, or dispute; and to make such order for payment of so much wages to such servant, artificer, &c. as to such justice or justices shall seem just and reasonable, provided that the sum in question do not exceed 10*l.* with regard to any servant, nor 5*l.* with regard to any artificer, &c.; and in case of refusal or non-payment of any sums so ordered, by the space of one-and-twenty days next after such determination, such justice and justices shall and may issue forth his and their warrant to levy the same by distress and sale of the goods and chattels of such master or mistress, or person employing such artificer, &c. rendering the over-plus to the owners, after payment of the charges of such distress and sale." (b) The statute only recommends

(a) 10 *Co.* 76. *a.* case of the Marshalsea. (b) 20 *G. 2. c.* 19. *s. 1.*
the

the magistrate to examine on oath, but does not make it an indispensable condition; and if he has jurisdiction, then, according to *Rex v. Monkhouse*, the proceeding is conclusive. If so, this distress and sale given by the statute is not subject to replevin, but is in the nature of a statutory execution. Goods are only replevisable where they are taken by way of (a) distress. Replevin is a remedy grounded upon a distress, being a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to redeliver the distress if judgment shall be against (b) him. But the present is a case of execution directed to be levied by distress and sale, and therefore judgment *pro retorno habendo* cannot be awarded. The sale shews that this process is in the nature of an execution. Instruments of husbandry, and other things exempt from distress at the common law, are not exempt from distress for a poor-rate (c), which like the present is virtually an execution:

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Onslow Serjt., in support of the pleas. The Defendants, feeling that the oath has not been properly made, endeavour to erect a jurisdiction unknown to the common law, and attempt to establish this monstrous proposition, that a magistrate can examine otherwise than on oath. Here two oaths were necessary, the one, without which the summons could not be executed, the other, without which the complaint could not be heard by the magistrate. Replevin, it is said, will not lie here, and *Rex v. Monkhouse* is cited in support of this principle; but that case has been overruled by *Milward v. Caffin* (d). *Fletcher v. Wilkins* (e) is very strong in favour of the Plaintiff, and the whole

(a) *Co. Litt.* 145. b.(b) *Bull. N. P.* 53.(c) 3 *Salk.* 136. 4.(d) 2 *Bl.* 1330.(e) 6 *East*, 283.

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tenor of that case tends to shake the arguments of the Defendant. It is urged on the other side, that here is a provision for distress and sale, and that if the goods are sold, there can be no judgment for a return; but it is the frequent practice for juries to find the value of the goods replevied, and for the Court to award that value instead of a return of the pledge. The cognizance is bad in the material part, for no warrant of distress can issue till twenty-one days have elapsed after the demand, and then only in case of refusal; but by the pleadings it does not appear, either by reference, or express averment, that the Defendants waited twenty-one days: every date is laid under a *scilicet*. [*Burrough J.* There are more than twenty-one days between the 29th day of *September*, on which the adjudication is averred to have been made, and the 21st of *November*, on which day the warrant of distress is averred to have been issued, and the Court is not to intend that all this is bad.] The Court will not hold that this statute intended to create a jurisdiction not upon oath. He also cited *Fenton v. Boyle*. (a)

Taddy, in reply, said, that his argument was founded on the ground, that the oath first mentioned in the statute, and which is not the oath first mentioned in these pleadings, is not necessary to give the magistrate jurisdiction. He contended that the law as laid down in *Rex v. Monkhouse* had not been impeached. Here a judgment is exercised by the magistrate, whose office is not merely ministerial.

DALLAS C. J. I think there is no doubt in this case. The question is, whether the magistrate has jurisdic-

(a) 2 N.R. 399.

tion, and he has jurisdiction, on complaint made to him on oath, to enquire whether a servant has wages due to him from his master. The magistrate has exercised that jurisdiction which the statute has given him. This case is quite different from the case of *Milward v. Caffin*. There the premises were not in the occupation of the party, and therefore the overseers of the poor had no jurisdiction to rate him; nor, consequently, had the magistrate any jurisdiction to confirm the rates, but here the magistrate has a jurisdiction which he has properly exercised.

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BURROUGH J. In *Milward v. Caffin* the overseers of a parish rated a man who was not in occupation. They had no authority to rate him. All that the justices afterwards did could not make such an illegal act good.

PARK J. of the same opinion.

RICHARDSON J. It is clear that this action will not lie. In *Bacon's Abridgment* (a) it is said, that where distress and sale are given by act of parliament, replevin does not lie; but attachment will not be granted against the under-sheriff who grants the replevin. It might as well be said, that in a conviction under the game-laws the matter could be ripped open again upon the allegation that the examination was not on oath. It cannot be in all cases necessary to examine the parties on oath; as for instance, in a case where they agree on the statement of the facts.

Judgment for the Defendants.

(a) *Bac. Abr.* 5th ed. vol. 6. p. 58., *Replevin* (C), *Bradshaw's case*.

1819.

May 14: **FOWLER v. The Inhabitants of the Hundred of
LONINBOROUGH.**

In order to bring an action against the hundred on the stat. 9 G. 1. c. 22., the notice required by the statute must be given to some of the inhabitants of the hundred before the Plaintiff's examination on oath is delivered to the magistrate.

THIS was an action on the statute of 9 G. 1. c. 22. to recover damages for a barn that had been set on fire by some person or persons unknown. At the trial before *Bayley J.*, at the *Maidstone* Spring assizes, 1818, it appeared that the Plaintiff's examination on oath had been delivered in to a magistrate before the notice required by the statute had been given to two inhabitants of the hundred. An objection was taken to this, and the jury were directed to find a verdict for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit. Accordingly *Vaughan Serjt.* on a former day having obtained a rule *nisi*, on the ground that the notice required by the statute to be given to two inhabitants of the hundred ought to have preceded and not followed the examination on oath delivered in to the magistrate,

Lens Serjt. now shewed cause against the rule. Even if it should be thought convenient that such a regulation as that now contended for should be observed, yet there were no words in the act to justify such a construction. No person shall be enabled to recover unless he shall, within two days after the damage or injury done him, give notice of the offence done and committed, unto some of the inhabitants of some town, village, or hamlet, near unto the place where such fact shall be committed, and shall, within four days after such notice, give in his examination upon oath, or the examination upon oath of his servant or servants, that had the care of his house, &c. before any justice of
peace

peace of the county (a). All that is required is, that there should be notice of the fact; but as the party aggrieved is not required to give notice of the name of the magistrate to whom he intends to deliver his examination, nor of the time when he is to deliver it, it would be nugatory to insist that the notice to the inhabitants should precede the making of the deposition. The notice of the fact, which is all that the statute requires, would not assist the inhabitants in ascertaining what magistrate was to receive the deposition, or the time at which he was to receive it. Even if the inhabitants should learn when and where this would take place, to what purpose should they attend? The party is simply called on to deliver in a written deposition on oath; this the magistrate is bound to receive without question, and his office, instead of being judicial, is purely ministerial. In *Thurtell v. The Inhabitants of the Hundred of Mutford* (b), Lord Ellenborough said, that the word *examination* in this act is incorrectly used, and that a written *declaration* is what was meant. This is a restrictive act, and the Court will not add to the restriction imposed by it: though four days after the notice are allowed for making the declaration, or rather deposition, that provision is only directory, not imperative; and for aught that appears in the act, the deposition may be made at the same time the notice is given. The present motion is, in effect, an attempt to engraft a legislative improvement on the act, if it could be deemed an improvement; that the inhabitants should attend the delivery of the deposition. Were this to be the effect of the statute, it might be contended at once, that it would be much better to have the whole matter tried before the justice.

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ants of
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ROUGH.

(a) 9 G. 1. c. 22. s. 8.

(b) 3 East, 400.

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ants of
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ROUGH.

Vaughan Serjt., in support of the rule, was stopped by the Court.

DALLAS C. J. The only question is, not what the act ought to have said, but what it has said. It has said that the party shall within two days after the offence committed give notice to some of the inhabitants of the hundred, and within four days *after such notice* deliver in his examination. The fact is, that in this case the delivery of the examination has gone before the notice, and unless we can construe *before* to mean *after*, the provision of the act has not been complied with.

The rest of the Court concurring, the

Rule was made absolute.

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BUTLER *v.* BROWN.

The statute 43 G. 3. c. 46. s. 3., for allowing costs to a Defendant, in case of arrest without probable cause, does not extend to cases where a Defendant pays money into Court, and the Plaintiff takes it out, though it be a much smaller sum than that for which the Defendant is holden to bail.

THE Plaintiff had arrested the Defendant upon an affidavit of debt for 15*l.* 14*s.* for rent; the Defendant paid into court 2*l.* 17*s.* 6*d.*, which the Plaintiff took out. The prothonotary, in taxing for the Plaintiff his costs of suit, allowed him therein the costs of the arrest; whereupon *Lens* Serjt., on a former day, had obtained a rule *nisi*, on the statute 43 G. 3. c. 46. s. 3., for reviewing the taxation, disallowing the costs of the Plaintiff, and for taxing the Defendant his costs, on the authority of *Laidlaw v. Cockburn*. (a)

Vaughan Serjt. on this day shewed cause against the rule, citing the several authorities referred to in the ensuing judgment.

(a) 2 *New Rep.* 76.

DALLAS

DALLAS C. J. It has been decided in five cases subsequent to the case of *Laidlaw v. Cockburn*, that the statute is not applicable to the present circumstances.

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PARK J. A case of *Edm v. Molyneux*, which is not in print, was decided in this Court in *Trinity Term*, 1816. And it appears by the latter part of the report of the case of *Talbot v. Hodson* (a), that my Brother *Best*, then at this bar, made a similar application. That the sense of the word "recover" in the statute does not apply to the case of taking money out of court which is paid in under a rule, is also decided by the case of *Clarke v. Fisher* (b), and in *Linthwaite v. Billings* (c): in the former of which Lord *Ellenborough* C. J. held, that a recovery must mean a recovery by judgment. And *Lawrence* J. there makes a very important observation, that the rule for payment of money into Court is always obtained on payment of costs, and that it is therefore incongruous that the Defendant should afterwards apply to discharge himself from the payment of costs.

The rest of the Court concurring, the rule was

Discharged.

(a) *Ante* VII. 251. 254. S. C. 132. last edit. 136. and S. C. 1 *Marsh*, 530. 1 *Smith's Rep.* 428.

(b) *Hullock on Costs*, 2d edit. (c) 2 *Smith's Rep.* 667.

1819.

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HANNAFORD and ELIZABETH his Wife, Plaintiffs ;
PEARCE, Deforciant.

The Court allowed the warranty of a fine to be amended, by altering it from a warranty by the husband and wife and heirs of the husband, against themselves and the heirs of the wife, to a warranty by the husband and wife and the heirs of the wife, against themselves and the heirs of the wife.

LENS Serjt. moved to amend a fine under the following circumstances. The form of the warranty was as follows : And, moreover, the said *John* and *Eliza* (the Plaintiffs) have granted for them and *the heirs of the said John*, that they will warrant to the aforesaid *Samuel*, (the Deforciant,) and his heirs, the tenements aforesaid with the appurtenances, against them the said *John* and *Eliza*, and *the heirs of the said Eliza* for ever. He cited *Rolle's Abridgment* (a), where it is said, that husband and wife should warrant for themselves and the heirs of the wife, against themselves and the heirs of the wife: and this is right; and he prayed, that the warranty by the husband and wife in the present case might be amended, by altering it in conformity to this precedent: at present it stood as a warranty by the husband and wife, and heirs of the husband, against themselves and the heirs of the wife.

Fiat.

(a) *Fine O*, pl. 3. *Acc. 2. West. Symbol. p. 20. s. 74.*

1819:

R. BARLOW, Demandant; MACDOUGAL, Tenant; May 15.
W. BARLOW, Vouchee.

JOHN BARLOW being tenant in tail of one equal moiety of the estate after mentioned, conveyed it by lease and release to the use of himself for life, with remainder in tail to his eldest son *William Barlow*, the Vouchee, who was his issue in tail. *John Barlow* had also contracted and paid for and taken a conveyance by lease and release of the fee-simple of one other moiety of the same premises, from *Walter Hornbuckle*, who was tenant in tail thereof, so that *John Barlow* became therein seised of an estate of freehold for the life of *Walter Hornbuckle*. The estate consisted of a cottage in *Flickling*, in the county of *Northampton*, a land in a common field called *Woodfield*, a ley in another common field called *Barlandsfield*, two beast-pastures, ten sheep commons, and several pieces of arable land, meadow, pasture, and grass ground, in the open fields, precincts, and territories of *Flickling*, constituting one oxgang or half-yard-land. *John Barlow* subsequently purchased six other oxgangs of land in the same open common fields, and with their common rights, and he took conveyances thereof to himself in fee. An inclosure act having passed in 1775, for dividing the open fields, common meadows, and waste grounds in *Flickling*, the commissioners in 1776 awarded to *John Barlow* three several allotments, respectively containing 22 perches, 20 acres, and 96 acres, together 116 acres and a

A. was tenant for life of two moieties of common field land called *Blackacre*, with remainders to *B.* and *C.* in common tail. *A.* was also tenant in fee of other common field land called *Whiteacre*. The commissioners under an inclosure act allotted to *A.* *Greenacre* in lieu of *Blackacre* and *Whiteacre* conjointly, without distinguishing the portion allotted in right of each. *A.* devised all his lands to *D.* in fee, and died. Covenant upon a conveyance by *B.* and *C.* to *D.* of all the land allotted to *A.* in right of *Blackacre*, and a recovery suffered of the entirety of certain acres, fewer than were comprized in *Greenacre*. *Burrough J.* held that all the estate of the tenants in tail was comprized in that recovery, and the Court refused to amend it by the insertion of more acres.

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R. BARLOW,
Demandant.

fraction, which they, by their award, expressed and declared to be "in lieu and in full compensation of" "all his lands and common rights in and upon the" "lands intended by that act to be divided and inclosed," without distinguishing any part in certain as allotted in lieu of the entailed oxgang or either moiety of it. *John Barlow* devised the fee-simple of all his lands to the Demandant *Robert Barlow*, his youngest son, and bequeathed to the Vouchee, *William Barlow*, who was his eldest son and issue in tail, a certain sum of money, on condition of his conveying to *Robert Barlow* his interests in the entailed oxgang; and *William Barlow* the Vouchee making his election to accept his father's legacy and convey the fee-simple of his moiety, and *William Hornbuckle*, the issue in tail of *Walter Hornbuckle*, being satisfied that his father had received a full consideration for the purchase of the fee-simple of his moiety, and being content to confirm the same, accordingly, in 1797, by a deed intended to make a tenant to the præcipe, they purported to release to *Robert Barlow*, first, the entailed lands above described, by the like description by which they used to be designated, before they had been taken away by the inclosure act and award, and the allotted lands substituted for them. The releassors thereby also released, "all such pieces of land as had been awarded and allotted to *John Barlow* in lieu of the entailed oxgang and premises, or any part thereof, by the commissioners named in the above-mentioned act of parliament. They also thereupon suffered a recovery of one messuage, two gardens, twenty acres of land, twenty acres of meadow, and twenty acres of pasture, and common of pasture for all manner of cattle in *Flickling*. And now upon a subsequent sale by *Robert Barlow*, it was objected that his issue in tail, and the issue in tail of *William Hornbuckle*, would, by the

the award, acquire in right of their respective moieties of one entailed oxgang, an interest *per my et per tout* in every part of the 116 acres, which had been indiscriminately allotted to *John Barlow* in lieu of all his seven oxgangs, and that consequently their estates tail in their moieties of this one undivided seventh part or moiety of 116 acres were, at least as to 36 acres thereof, not barred by a recovery which comprised only 20 acres of land, 20 acres of meadow, and 30 acres of pasture; so that the relessors *Robert Barlow* and *William Hornbuckle* had neither conveyed to *John Barlow* a good title to the entirety of any part of the allotments in severalty, nor had they barred their issue of the estate tail which over-rode every parcel of the allotments. And *Vaughan* Serjt. accordingly now moved to amend this recovery by increasing the number of acres to 50 acres of land, 20 of meadow, and 80 of pasture, upon the usual terms of paying the additional king's silver, on an affidavit that the whole estate of both the tenants in tail was intended to be passed; consequently, he urged, the interest of no one could be affected by the amendment, except the estate of the issue in tail, which interest the parties had a right to bar, and intended to bar by this recovery; and the words of the deed to make the tenant to the præcipe were sufficiently large to effectuate this intention; it only was requisite to make the comprize of the recovery commensurate with the operation of the deed.

BURROUGH J. objected, that the amendment prayed for sought to comprise in the recovery the entirety of lands, whereof the entirety was not allotted in lieu of the one entailed oxgang: he also declared that there was no ground for the objection to the title, and that it had

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R. BARLOW,
Demandant.

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Demandant.

been very captiously taken, for that the vendor could deliver land enough.

And the Court refused the application.

May 15.

HARDING v. GARDNER.

A devise of
" my freehold
estate, consist-
ing of 30 acres
of land, more
or less, with
the dwelling-
house and all
erections on
the said farm
situated at
*Sudbury
Harrow*, in
the county of
Middlesex,"
passes an es-
tate in fee-
simple.

THIS was a case directed by His Honor the Master of the Rolls for the opinion of this Court, by his decree in the above cause, dated the 7th May, 1818. The case stated, that *Stanley Gardner*, deceased, being seized in fee-simple of the estate and premises at *Sudbury Harrow*, hereinafter mentioned, made his last will and testament, in writing duly executed and attested to pass freehold estates, in the words following: " I bequeath to my brother, *James Gardner*, of *Sudbury Harrow*, in the county of *Middlesex*, my freehold estate, consisting of 30 acres of land, more or less, with the dwelling-house, and all erections on the said farm, situated at *Sudbury Harrow*, in the county of *Middlesex*, now in the occupation of my brother *James Gardner*, above-mentioned." The testator died on the 11th March, 1817, seised of the same estate in the said freehold estate and premises at *Sudbury Harrow* aforesaid, whereof he was seised at the time of making his said last will and testament, and without having in any respect altered or revoked the same; and leaving the Plaintiff, *James Gardner*, the devisee of the said estates and premises at *Sudbury Harrow* aforesaid, surviving. The Defendant, *William Gardner*, was heir at law of the devisor. The question was, " What estate does

James Gardner, the devisee, take under the devise in the said will of the estate at *Sudbury Harrow*?

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HARDING

GARDNER.

Copley Serjt. for the Plaintiff. By this devise the Plaintiff takes an estate in fee. The principle on which a testamentary expression, such as the present, must receive its construction, has been well laid down by *Gibbs C. J.* in *Randall v. Tuchin*. (a) "The word estate is here used in the operative part of the devise; not introduced incidentally after the devising part is perfected, but introduced in the devise itself. It is admitted by the counsel for the Plaintiff, that the word estate carries a fee, unless other parts of the will restrain its effect. Formerly a narrower construction prevailed, and it was held, that if the former words described locality the word estate was not descriptive of the quantity of interest, but designated local position: but it is now held that though the word estate points at a certain house or parish where the estate is situate, yet it shall carry a fee unless restrained by other parts of the will. It may be that the signification of the word estate may be restrained, but it lies on the party who seeks to narrow its construction, to shew by what expressions in the will it is restrained." The words in the present devise are, "My freehold estate, consisting of thirty acres of land more or less, with the dwelling house, and all erections on the said farm situate at *Sudbury Harrow*, in the county of *Middlesex*, now in the occupation of my brother *James Gardner* above mentioned." Here then the word estate is in the operative part of the devise, and there is nothing to cut it down, and the description of local situation and quantity, does not at all restrict the interest that passes by the word estate. In the case of *Roe on the Demise of Child v. Wright* (b), where the

(a) *Ante*, VI. 410. 2 *Marsb.* 117.(b) 7 *East*, 259.
testator

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v.
GARDNER,

testator devised "all his estate, lands, &c. known and called by the name of the *Coal Yard*, in the parish of *St. Giles, London*," Lord *Ellenborough* says, "I cannot but consider the words '*lands, &c.*' which follow the word *estate*, as descriptive only of the subject-matter, in which the general interest predicated before by the word *estate* consisted; and as tantamount to all my estate in *lands, &c.* or to all my estate in *lands, houses, or whatever else it may be.*" The vice of the Plaintiff's construction is, that *estate* and *lands, &c.* must be made to mean the same thing as *lands* only, in order to defeat the effect of the word *estate*: whereas according to the Defendant's construction, each word will have its proper signification: namely, the word *estate* as expressive of the entire interest; *lands* as expressive of the particular subject-matter, or particular kind and quality of the thing in which such entire interest subsists. Supposing, therefore, that the proper and natural effect of the word *estate* is not restrained by the words "*lands, &c.*" the only remaining question will be whether it be so restrained by the words, "*called or known by the name of the Coal Yard, in the parish of St. Giles.*" But if those words be applied to the word *estate* standing in its general and unrestricted sense, they will collectively amount to no more than, viz. "all my estate in the *lands, &c.* in *St. Giles'* parish, called the *Coal Yard.*" So in the present case, the construction contended for by the other side must lead them into the same vicious argument as was exposed by Lord *Ellenborough* in *Roe v. Wright*: they must leave out the word *estate* altogether, or their argument fails. They may urge, indeed, that the word *estate* can only point to local situation, when followed by the words "*consisting of thirty acres,*" but supposing, in the case of *Roe v. Wright*, the deviser instead of writing "*my lands called and known by the name*

name of the Coal Yard," had written "*my lands consisting of a coal yard,*" could this have made any difference in the meaning? and *vice versa*, could "*called or known,*" if in the present case substituted for "*consisting,*" have altered the effect of the devise in the slightest degree. Indeed Lord *Ellenborough* made use of the very word *consisting*, so that the case is completely in point, and an answer to a case decided in Chancery in 1802 on which the other side must mean to rely. That case is contrary to all the principles which have been laid down on this subject; it is perhaps directly in point, but it is anterior in date to, and conflicting in result with, the subsequent decision of *Roe v. Wright*, and was adjudged at a time when a narrower construction prevailed.

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Blosset Serjt. for the Defendant. The Plaintiff takes only a life-interest. The word estate has two meanings attached to it: first, its legal meaning, expressive of the interest which a party has in property, and then its popular sense, which, without adverting to any interest, implies only the land, which may be the subject of such interest; and the question is always, whether the deviser uses the word in its legal or popular sense. That question can only be answered by looking at the other words in the will connected with the word estate; and more remote words must not be examined for this purpose, till we have decided on the operation of the words next following. Here it is clear the deviser meant the word in its popular sense, and with reference only to the locality of the property; "*my freehold estate consisting of 30 acres of land, more or less, with the dwelling house, &c. situated at Sudbury Harrow.*" Where no local description is superadded to the word "*estate,*" it undoubtedly may carry a fee, because there are no means

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means of shewing, that the devisor did not use it in its legal sense: but the devisor may restrict the word "estate," and use it in its popular sense; and how is it possible to know that he has done so, if not by super-added words of local description, such as are used in the present devise? If he uses the word only in its popular sense, meaning the land itself, and says nothing about the interest, the heir shall not be excluded but by express words conveying a fee. Now the criterion, by which it has always been ascertained, whether or no the devisor meant to use the word estate in its legal or popular sense, has been the addition or omission of superadded words of local description. A man's interest cannot consist of thirty acres, though his estate, in the popular sense, (that is, his possessions,) may. What interest he may have in his estate of thirty acres is completely excluded from view by the addition of the words thirty acres to the word estate. In *Pettiwarde v. Prescott* (a), the Master of the Rolls says, "At an early period it was doubted, whether the word "estate" merely was to be applied to the land only, or to the interest in it: it has been long settled, that it is of itself sufficient to carry the fee. But, when words of locality, as "in" or "at" a particular place are added, the question is, whether they do not narrow and restrain the import of that word. So lately as Lord Talbot's time, this was a subject of doubt and controversy. In *Ibbetson v. Beckwith* (b) it was strenuously argued, that under a devise of "all my estate" nothing passed but an estate for life. It does not appear from the report, but is stated in a note in *Peere Williams* (c), that that case first came on at the Rolls; where it was held, that the devisee took only an estate for life. Lord Talbot, how-

(a) 7 Ves. 341.

(b) For. 157.

(c) 2 P. Will. 337.

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ever, was of opinion, not, as may be collected from his judgment, that these words necessarily imported a fee, but, that upon the whole will it was sufficiently apparent, that the deviser meant a fee to pass. Some years afterwards, *Goodwyn v. Goodwyn* (a) occurred before Lord *Hardwicke*, who expressed much doubt, whether the estate in fee passed by the force of the words "all my estate." The question remained undecided, and no case very nearly resembling it has since received a decision. But both Lord *Mansfield* and Lord *Kenyon* have stated opinions similar to that, to which Lord *Hardwicke* appears to have inclined, the former in *Hogan v. Jackson* (b); and in *Fletcher v. Smiton*, Lord *Kenyon* says (c), "There are cases in which nice distinctions have been taken between a devise of an estate at such a place, and a devise of an estate in a particular place; and Lord *Hardwicke* alluded to it in the case cited in *Vesey* (d); but he added, that there is no case in which it is held, that a fee passed by the devise of an estate, if the testator added to it 'in the occupation of any particular tenant;' and I admit, that the word, 'estate' may be so coupled with other words, as to explain the general sense, in which it would otherwise be taken, and to confine it to mean farms and tenements. But that is not the present case, no such words are here superadded to estates." In that case, we see, the Master of the Rolls expressly adverts to the modern doctrine that the word "estate" is allowed to carry a fee in certain cases, and does not cut it down by any narrower construction than prevails at present, so that from first *Vesey* down to 1802, we have the concurring judgments of Lords *Hardwicke*, *Mansfield*, *Kenyon*, and Sir *W. Grant*, that there is no instance of its carrying

(a) 1 *Ves.* 226.(b) *Cowp.* 299.(c) 2 *Term Rep.* B. R. 658.(d) 1 *Ves.* 228.

a fee,

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a fee, when restrained and confined to mere local description, by the addition of the words "in the occupation of such or such a person." The Master of the Rolls then continues, "The question here is, whether the superadded words do not clearly shew that the deviser did not mean to speak of the quantity of his legal interest, but merely the *corpus* or subject, in the disposition. I am of opinion, they do. His words are not 'all my estate', but 'my copyhold estate at *Putney*, consisting of three tenements,' &c.: that is 'The estate I give you at *Putney* consists of three tenements,' which is the same as saying, 'Three tenements compose the estate I give you:' a mere description of the thing, and not of his interest. That he meant to give the houses absolutely there is little doubt. So a testator generally does, when giving under any description. But we must look at what he says, not at what he thought." In *Randall v. Tuchin*, "estate" was the operative word, and none were added, but such as would restrict it to the designation of interest. *Heath J.* there said, "The principle is, that where the word "estates" is an operative word, it passes a fee, and to try whether it be operative or not, the test is, to strike it out of the will, which test being applied here, the devise becomes nonsense." In the present case, "estate" is not the operative word. *Roe v. Wright* advances the Plaintiff's case as little as the preceding: Lord *Ellenborough* there says, that the vice of the construction contended for is, that estate and land must be taken to mean the same thing as land alone, and by that construction the word "estate" must be dropped out of the will. There, therefore, the word "estate" could only apply to interest, or the word "land" must have been omitted, for the restrictive words there, descriptive of locality, follow after and belong to the word "land," and not to the word "estate," and it would have been hard indeed to have transposed

them from the place where they stood, and have affixed them to the word "estate," for the purpose of defeating the deviser's intestation.

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 v.
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Copley in reply. It certainly cannot be contended, that the case in *Vesey* does not apply, and if the Court thinks it outweighs the subsequent authority, they must decide accordingly. As to the two senses that may be affixed to the word "estate," that word, and every other, must be taken in its proper and technical sense, unless there is something to show that it was not so meant. The *onus* of showing that rests with the party who impeaches its regular application. *Prima facie* it is to be taken in its technical sense, and it ought to be clearly shown that the testator meant to exclude that sense. The words "*Sudbury Harrow*, in the county of *Middlesex*," were necessarily used by the deviser in the present case for the purpose of shewing where his estate, and the interest in it, lay. But it has been said, how can an estate, which is a mere interest in property, be called "thirty acres?" In the same manner it might have been asked in *Roe v. Wright*, how it could be called "a coal yard;" but Lord *Ellenborough* has explained this by saying, that as the word "estate" includes the idea of interest, the devise is, in effect, a devise of the deviser's interest in a coal yard. If the deviser in the present case had said, "all my estate and interest consisting of thirty acres," would there have been any impropriety in the expression? especially after Lord *Ellenborough* has explained the subsequent descriptive words to do no more than point out the subject-matter of the interest. *Heath J.*, in *Randall v. Tuckin*, only said, "If you find that by striking out the word 'estate,' the remainder must be nonsense, then 'estate' is expressive of interest;" but it does not, therefore,

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fore, follow, that it ought to be struck out, because the sentence might stand without it. If it be retained here, a construction may be given it, and that construction can express nothing else than the interest to be conveyed. The case in 7th *Vesey* cannot be reconciled in principle with the other decisions.

Cur. adv. vult.

The following certificate was afterward sent:—

“This case has been argued before us by Counsel. We have considered it, and are of opinion that *James Gardner*, the devisee under the devise in the will of *Stanley Gardner*, deceased, of the estate at *Sudbury Harrow*, takes an estate in fee-simple.

R. DALLAS.
 T. A. PARK.
 J. BURROUGH.
 J. RICHARDSON.

May 28. 1819.”

May 17.

BONNER v. LIDDELL and Others.


Agreement for
 a lease for 63
 years from
 1st of May
 1801; the
 lessee to be
 allowed three

THE parties to the above cause had entered into an agreement, dated 19th January, 1801, for a lease of certain coal mines. That part of the agreement, which specified the proposed duration of the lease, was as follows:—
 years from that time for winning the colliery without payment of any rent. An arbitrator, being authorized to give such direction for a lease according to the agreement as he should think fit, directed a lease for 63 years from the 1st of May, 1804: Held that he had exceeded his authority, and that the award was bad.

lows:

lows: "The term of the lease to be sixty-three years, except Mr. *Bonner* and Colonel *Airey's* interest, whose estates being entailed, they can only grant for twenty-one years, but for which period they engage to renew the same, whenever requested, by and at the expence of the lessees. The lessees to be allowed three years, from the 1st May, 1801, for winning the colliery, without payment of any rent, and to have power to begin to bore and win immediately." The lease never having been executed, the Plaintiff brought an action for the use and enjoyment of the mines. At the *Northumberland Assizes* in 1817, a verdict was taken for the Plaintiff, with 3000*l.* damages, subject to the award of a gentleman at the bar, to whom all matters in difference were referred, with power to take such assistance as he should think fit, and to make such regulations, and give such directions as to a lease, according to the agreement, as he should think fit. Since 1801, *Bonner* had become seized in fee of the premises, of which at that time he was only tenant in tail. The arbitrator awarded, among other things, that *Bonner*, and others concerned with him, should execute to the defendants a lease of the premises for sixty-three years, to be accounted from the 12th May, 1804.

Vaughan Serjt. on a former day had obtained a rule nisi to set aside the award on various grounds, but chiefly because the arbitrator had exceeded his authority, 1st, by granting a lease for sixty-three years from May, 1804, instead of a lease for sixty-three years from January, 1801; and 2dly, by awarding that *Bonner* should grant a lease absolute for sixty-three years, instead of a lease for twenty-one years, renewable at the request and expense of the lessees.

1819.

BONNER
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 and others.

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and others.

Hullock Serjt. in shewing cause against the rule, contended, that upon the construction of the agreement, it was clear the parties intended that the sixty-three years should commence from 1804, because no rent was to be paid for the three years before that time. With respect to the objection, that the lease to be executed by *Bonner* ought to have been for twenty-one years only, renewable according to the terms of the agreement, he argued that the parties meant evidently to give the defendant a lease for sixty-three years, as far as it was in their power to do so: that such of them as were seized in fee were to convey a term of sixty-three years absolutely; such as were seized in tail were to convey a term of twenty-one years, (which was all they could do,) under an engagement to renew every year till the sixty-three years were made up. If, therefore, a tenant in tail afterwards became seized in fee, he did no more by executing a lease for sixty-three years, than he could have been compelled to do by granting two renewals for twenty-one years, if he had continued to be tenant in tail. This mode of fulfilling the agreement was the same in effect as the other, but saved the parties much trouble and expense.

Dallas C. J. now gave judgment, and said the Court were of opinion that the award was bad. It had ordered the lease to run from the time of the commencement of paying rent, whereas, according to the agreement, the time which elapsed before the payment of rent, formed part of the sixty-three years.

Rule absolute.

1819.

COLLINGWOOD, Demandant; WILMOT, Tenant; May 18.
LORD HOWE, Vouchee.

THE deed to make the tenant to the præcipe for suffering a recovery in 1754, conveyed all that farm with the appurtenances known by the name of *Statherne* farm, situated in *Statherne*, all the farm called *Barston* farm, situate in *Barston*, and all that parcel of meadow ground, called *Hoes* meadow, lying in *Hoes*, all in the county of *Leicester*, and all other the lands of Lord *Howe*, within the manors, lordships, towns, villages, hamlets, precincts, liberties or territories of *Langar*, *Barneston*, *Statherne*, *Barston*, *Hoes*, *Granby*, *Coulston*, *Bassett*, and *Epperston*, or elsewhere in the counties of *Nottingham* and *Leicester*. The premises, as it was sworn, contained by admeasurement, *Barston* farm 123 acres, 1 rood, 31 perches, and *Statherne* farm 146 acres, 3 roods, 4 perches; but the recovery suffered in *Leicestershire* in pursuance of the deed above stated, comprized only two messuages, twenty acres of land, forty acres of meadow, and forty acres of pasture in *Statherne*, *Barston*, and *Hoes*. In 1720, when the owners of the estate had suffered a recovery of the same premises, and conveyed them to the tenant to the præcipe by the same description as in the deed of 1754, and with the same general words, they had caused the recovery to comprise six messuages, ten gardens; 300 acres of land, 12 acres of meadow, 50 acres of pasture, and common of pasture for all cattle in *Stathurne* otherwise *Statherne*, *Barston*, *Hoes* and *Plungar*. Upon these facts, without more explanation than that it was supposed to be a blunder of 20 for 300 acres, *Blosset* Serjt. moved to amend the recovery of 1754, by insert-

Where a recovery 50 years old was found, by mistake, to comprize only two messuages and 20 acres of land, instead of six messuages and 300 acres of land, the blunder being wholly unexplained and unaccounted for, the Court refused to permit an amendment by substituting the larger quantity.

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ing six for four messuages, and 300 for 20 acres of land, conceiving that the ordinary indulgence of the Court under like circumstances would extend to this case.

But the Court held, that it appeared impossible that the parties should have meant to comprize so much land. The Court had already in many cases extended their indulgence quite far enough; but no case had gone so far as this, and the consequence of permitting the amendment now sought for, would be to cast it on the Court, to find out on this imperfect evidence, the meaning of these parties in their transactions, 60 years back, and to supersede the necessity of using any degree of accuracy whatever in preparing conveyances; and they

Refused the application.

May 21.

WELCH v. UPPILL, Clerk.

The rector's right to the tithe of lambs vests at the time when they are weaned, although the tithe cannot be set out until they are fit to be weaned.

THIS was an action on the case against the Defendant, as rector of the parish of *Lamyat*, for not removing five calves and one lamb, alleged to have been set out by the Plaintiff for his tithes of calves and lambs arising upon lands in the parish, of which the Plaintiff was occupier. At the trial before *Best J.* at *Taunton* spring assizes 1819, it appeared that there had been a composition by the Defendant with the Plaintiff for his tithe, which composition ceased on the 25th *March* 1816; that several calves and lambs were dropped before *Lady-day* 1816, which were not fit to be weaned till after *Lady-day* 1816, and that several other calves and lambs were dropped after *Lady-day* 1816, the tithe of which last alone the Plaintiff set out. The Defendant contended

tended that the whole tithe of the calves and lambs was not set out, for that he was entitled as well to the tithe of those which were born before *Lady-day*, but not fit to be weaned till after *Lady-day*, as he was to the tithe of those which were born after *Lady-day*, and he therefore contended he was not bound to take those which were set out. *Best J.* was of opinion that the Plaintiff was entitled to a verdict, because the right to the tithe of animals vests when they are dropped, and the tithe of the calves and lambs born before *Lady-day* was therefore covered by the old composition; and a verdict was entered for the Plaintiff, damages *5*l.**, with liberty to the Defendant to move to enter a nonsuit.

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Pell Serjt. having accordingly on a former day obtained a rule *nisi*,

Lens Serjt. now shewed cause. He contended that the time when the right to the tithe of animals vested was the time of their birth, although it was clear by many cases that they are not severable till the time when they are fit to be weaned, insomuch that it has been a question whether a custom to sever young animals from their dams at an earlier period can be supported. But no case had directly decided the question at what period the right vests. Where ewes, (*a*) being kept in *Driffild* common field till nearly ready to yearn, were then carried into the parish of *Skern*, where a modus for lambs existed, yearned there, and were kept for forage till *Lady-day*, and then brought back to *Driffild*, it was held that this was not a sufficient indication of fraud, to entitle the rector to demand an issue on the fraud: however, it is clear, this could not be an effective fraud,

(*a*) *Boys v. Ellis. Bunb. 139. S. C. Gwill. 647.*

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unless the tithe became due where the lambs were dropped; for if the right to the tithe did not accrue till the tithe was fit to be set out from the other nine parts, then, by bringing the ewes and lambs back before *Lady-day*, which is a season long before the tithe is capable of being set out, the tithes would all accrue in *Driffild*. It has been determined that a custom to take tithe lambs on *St. Mark's day* (25th of *April*), would be bad (a): *a fortiori*, therefore, is the 25th *March* too early. The right to tithe of corn accrues as soon as out, but it cannot be taken until put into sheaves. When the lamb is produced into the world the tithe becomes due, but when shall it be transferred? certainly not till it is fit to be removed; the setting out cannot take place sooner, without the destruction of the thing. It shall therefore remain a charge on the occupier for nurture till it be fit for removal, that is, till the time when the farmer separates the rest of his lambs from their dams. The whole difficulty proceeds from not adverting to the double meaning of the word titheable. The case in *Bunbury* is decisive, that the right to tithe attaches on the production of the animal into the world, though it is not to be set out till the later period when the animal can support itself.

Pell and *Copley* Serjts. in support of the rule. Neither on the one side or the other is any case found decisive of this question; the case of *Boys v. Ellis* affords only an inference. It suffices, in answer to that case, to say, that it involved a question of fraud, and the question of fraud was the only question there determined. The principle laid down on the other side, that the clergyman's right to tithe attaches at the moment when the thing which is the subject of tithe is severed,

(a) *Croft v. Blake*, 2 *Gwill.* 530. *Lister v. Foy*, 2 *Gwill.* 579.

is too broad. In *Newman v. Morgan* (a), the question was whether the farmer was compellable to ted the hay, or whether the parson could be compelled to take his tithe away, before the operation of tedding had been performed; and it was held, that the operation of tedding was first to be performed: the right therefore does not attach instantly upon the severance of the thing which is the subject of tithe. In *Croft v. Blake* (b), it is laid down, that lambs are titheable when they can live without their dam, and not before. In *Kenyon v. West* (c) the question was, whether a single calf were titheable or not; and the Court held that the tenth part of the value of the calf, when taken from the cow to be sold or killed, was the tithe to be paid. In *Bedford v. Sambell* (d), the judgment of *Eyre C. B.* is strong; for, speaking as to tithing lambs on *St. Mark's* day, he says, usage alone will not establish a custom: reasonableness is material. In *Com. Dig.* (e), it is said, the manner of payment by the common law is generally conformable to the canon: and after citing a provincial canon, 1305, it is said, "*By another canon incerti temporis, agni, vituli, pulli equini et alii fœtus decimales, decimentur habitatione ad loca ubi nutriuntur et oriuntur;*" shewing clearly, that the place where these animals are titheable is not decided by the mere place where they are dropped, but that there must be something more besides birth, viz. nutrition till the animal can provide for itself: if this were not so, either the owner of the dam, or of the tithe, might insist on a severance the moment that the animal was dropped; but the validity of the right never can depend on the option of the party, to make it in a reasonable or an unreasonable way. If it did, the double mischief above alluded to would be the

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(a) 10 East, 6.

(b) *Gwill.* 630.(c) 2 *Gwill.* 341.(d) 3 *Gwill.* 1058.(e) 3 *Co. Dig. Dismes*, H. 6.

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consequence, and the incumbent might be weak or wicked enough to insist on taking tithe of the animals when dropped, or the occupier of the land might harass the incumbent by setting them out at that moment. In the cases cited for the defendant the language is explicit, nor is there any case to the contrary. *Boys v. Ellis* has no application to the case before the Court; for the Plaintiff has no means of shewing that the lambs were not weanable, when they returned to *Drifffield at Lady-day*. *Lister v. Foy* is referred to as proof of this, but that case went not on the validity of the custom, but on the question of fact, whether the lambs were fit to be weaned on *St. Mark's* day; as to which, the Court allowed that such lambs as were able to subsist without the ewes on *St. Mark's* day, were then to be tithed, and the others so soon after as they were fit for it. It is argued as clear on the other side, that, from the season of the year the lambs could not be fit to be weaned on *St. Mark's* day; but unless that is made out clearly, the case is of no avail; for if the lambs were then in a titheable state, the fraud was complete. *Toller* (a) cites all the authorities, and shews in broad and general terms, that the time for tithing lambs is when the lambs are able to subsist without their ewes, and when the owner of the lambs weans his own, and not before. No case, indeed, goes the length of saying that the right to tithe does not subsist before that time, but no case says that it does.

DALLAS C. J. I am clearly of opinion that the right to the tithe of lamb vests at the time when the animal is dropped. It has been said that there is no authority for this, but all the authority to be found goes to that extent. But first let us examine how the case stands upon principle. The present case may be illustrated by considering the case of corn; there the right to tithe

(a) *Toller on Tithes*, 141.

attaches when the corn is severed from the land, and in that instance a distinction is to be remarked between the time of the tithe vesting, and the time of taking the individual chattel; suppose that the incumbent dies after severance of the corn, but before the tithe is set out; there the tithe has vested in the deceased parson, and will go to his executors, though it is not removable till something further be done. So, in respect to the mode of tithing grass, in the case of *Newman v. Morgan*, Lord *Ellenborough* C. J. says, "the rule then is, for the rector to take his tenth part, in that first convenient stage of the process, when the subject-matter may be equally divided; and that is, when it is put into grass-cocks in the common process of hay-making," so that between the time when the tithe becomes due, and when it is to be taken away, an operation is to be first performed; so here, in the case of tithe lambs, the severance of the young from the dam is analogous to the severance of the corn from the land, but they are not to be set out as tithe till a later period. The case in *Bunbury* is directly in point, and it distinguishes the right to the tithe of lambs from the case of tithe wool, which is said to be a divisible thing; tithe of lambs, therefore, is due when the animals are born, and vests when they are dropped.

PARK J. I have looked into all the cases, and it seems to me, that in principle they come to this, viz. the tenant of the land shall do for the clergyman what he would do for himself. This is expressly ruled in *Blaney v. Whitaker* (a) cited by *Le Blanc* J., in *Newman v. Morgan*. The case in *Bunbury*, and certain other cases, have led to some confusion, by using the word "titheable" in a sense denoting the time when the tithe should

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(a) *Michs.* 23 G. 3. *cit.* 10 E. 12.

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be severed. In *Boys v. Ellis* the Court proceeded on the assumption that the tithe of lamb must be paid where the animals fall, that therefore is the period to which we are to look for the right accruing. In this very Court, *Eyre C. J.*, after having sat twenty years as a Baron of the Exchequer, the Court which of all others is most conversant with questions of this nature, drew the distinction in *Wyburd v. Tuck*. (a) In that case crops had been severed before the granting of a lease of tithes, but the tithe had not been set out at the time when the lease of the tithe was granted, and the question was, whether the lessor or the lessee was to have the tithe. *Eyre C. J.* there (b) says, "The title to the tithe in question arose immediately on the severance of the tithable matter from the land. Is it not clear, that if a rector dies after the severance of the tithe, and before its separation, and a new rector comes in, the right to the tithe is in the old rector?" In *Trott v. Rudd* (c) which was the case of a bill filed by the lessee of a rectory and tithes, for a term commencing from *Lady-day 1773*, for, amongst other things, the tithe of lambs fallen after *Lady-day* in the year 1773, the Defendant by his answer stated that all his lambs in that year were yearned before *Lady-day 1773*, and that the tithes thereof were claimed by the former lessee, to whom he, the Defendant, had paid a pecuniary composition in lieu thereof, the Defendant's term, on his own shewing, not commencing till *Lady-day 1773*; and the Court, as to the tithe of lambs, dismissed the bill. That case is expressly in point.

BURROUGH J. In every one of the cases cited, the form of the issue goes to the time of dropping: it is said that there is no decision on the point; neither is there

(a) 1 Bos. and P. 458.

(b) 464.

(c) Wood, p. 11.

any decision that the eldest son shall inherit to his father, or that, in default of sons, his daughter shall inherit. For the same reason it may be, that no decision can be found fixing the time at which the right to the tithe of animals vests; namely, because the principle was never before disputed. In *Boys v. Ellis* the law was taken for granted; it was admitted that the right to the tithe accrued when the animal dropped from the dam. This principle is admitted in all the cases; and it is upon that same principle, that corn becomes subject to the right of the rector to the tithe on the instant when it is severed, though a further operation is required before the tithe-owner is bound to take it away. *Burn* (a) seems to be of opinion that the tithe of lamb is to be paid where the animal falls, and that it is not divisible like tithe of wool; but it is now clear that as well the tithe of lamb, as the tithe of wool, accrues in the respective places where the lamb is dropped, and where the wool is shorn. I am therefore clearly of opinion that the verdict is right.

RICHARDSON J. I am of the same opinion. In most cases of prædial tithe an intermediate operation is to be performed, before the tithe can be separated. It seems admitted here on both sides, as well as in all the cases, that though, in the instance of corn, the law is such, yet that the right vests on severance, and that where the death of the parson happens after severance, but before the setting out of the tithes, the tithe passes to the executors of the parson. So lambs, before their birth, are, as it seems to me, to be considered as analogous to growing crops; and, therefore, though there is no express determination in print, (for the *dictum* of *Burn* is not to be considered as an express authority,)

(a) *Ecc. Law*, 7th ed. vol. 3. p. 503.

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I am of opinion, that the right to the tithe of lamb attaches, so soon as the animals are dropped from their dams; though neither the owner of the ewes can compel the owner of the tithe to accept, nor can the owner of the tithe compel the owner of the ewes to set out the tithe of lambs, until they are able to subsist without their dams.

Rule discharged.

May 19.

MORELL, Demandant; ALBAN, Tenant; HATCHETT, Vouchee.

Where the præcipe in the vouchee's warrant of attorney in a recovery rightly described the parties to the plea, but the body of the warrant of attorney expressed, that the vouchee appointed his attorney to gain or lose in a plea of land against the tenant, instead of the demandant, the Court refused either to amend the warrant of attorney, or to suffer the recovery to pass, and to construe the latter clause as repugnant and inoperative.

AT the head of the vouchee's warrant of attorney in this recovery, stood the following præcipe: "Command *William Yeates Alban* that justly, &c. he render to *J. Fludger Morell*," &c. The warrant of attorney itself ran thus: "*Salop* to wit. *T. B. Hatchett Esq.* whom *W. Y. Alban* vouches to warranty, appoints in his stead *John Bembow* and *J. Moore*, gentlemen, his attorneys jointly and severally, against the said *W. Y. Alban*, to gain or lose in a plea of land. *Hatchett* was the tenant in tail intended to be vouched. The officers having upon this irregularity refused to pass the recovery, *Heywood Serjt.* moved, that either the warrant of attorney might be amended, by substituting the name of *J. F. Morell* for the name of *W. Y. Alban*, in the body of the warrant of attorney, or that the recovery might be permitted to pass with a voucher of *B. Hatchett* as the warrant of attorney now stood. The Court intimating an opinion that neither of these requests could be

granted,

granted, but one of the secondaries stating that numerous instances could be produced of amending warrants of attorney, *Heywood* was permitted to speak to the case on a subsequent day. As to the first point, he took a distinction between common recoveries and adverse suits, and urged that the case of the former was to be more favourably considered for amendments, than that of the latter; but at least the Court might make the same amendments in the former, as were allowed to be made in the latter after error brought. He urged, that after the tenant has appeared, and has vouched the vouchee, and the vouchee is received, the tenant is out of Court, and is become a perfect stranger to the proceeding, inasmuch that he cannot even bring a writ of error; and this warrant of attorney must, therefore, be considered in the same view, as if the vouchee had in the latter part of the instrument appointed his attorneys to appear for him in a plea of land against a mere stranger to the prior proceedings. The statute 8 *Hen. 6. c. 12*, enacts, that "for error assigned, or to be assigned, in any warrant of attorney in any places of the same rased, or interlined, or in any addition, subtraction, or diminution of words, letters, titles, or parcels of letters, found in any such warrant of attorney, no judgment nor record shall be reversed nor annulled." And the second section enables the "king's judges of the Courts in which any warrant of attorney for the time shall be, to examine such warrants of attorney by them and their clerks, and to reform and amend (in affirmation of the judgment of such records and processes,) all that which, to them, in their discretion, seemeth to be misprision of the clerks in such warrant of attorney, so that by such misprision of the clerk no judgment shall be reversed nor adnulled." Since the time of that statute the Courts have felt no difficulty in amending warrants of attorney; as soon as a warrant of attorney is enrolled,

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enrolled, it becomes a record of the Court, and the Court acquires jurisdiction over it to amend it, *Haley v. Riggs*. (a) The plaintiff by his warrant constituted *William Keeling* his attorney, and exhibited his bill, purporting to be by *John Keeling* his attorney; and upon error assigned, the Judges caused the declaration to be made conformable to the warrant of attorney, and affirmed the judgment. So *Hilliard v. Redner* (b), the plaintiff was executor, and error being assigned for want of a warrant of attorney, it appeared that there was a warrant of attorney for the plaintiff in the suit, but that it did not name the plaintiff executor, and it was held that it was well amendable; and it should be intended to be in this action, because there was not any other action depending. *Bro. Abr.* (c) So where a recovery was suffered against *Elizabeth* (d), and the warrant of attorney expressed, that "*Alicia* puts in her stead *A. B.* to gain or lose against *Norton*, and this matter was assigned for error, that there was no warrant of attorney entered on record for *Elizabeth*, whether this should be error, or only an amendable misprision, or not, was made a question. See the statute 8 *Hen. 6. cap. 12.* Also see *M. 14 Hen. 7.* the like in an assize; and note, that in the case above, in truth the record in bank of the warrant of attorney was amended after it was removed by writ of error. And when the error was assigned as above, the defendant pleaded that there was a variance between the certificate and the writing in bank, and shewed the statute of 8 *Hen. 6. c. 12.* touching this case: and *quære* the order of pleading this, and the certificate thereof." If, therefore, the present recovery had gone on to a writ of error, the Court would

(a) *Mo. 711.*(b) *Cre. Jac. 133. S. C. Janb.*
316. pl. 5.(c) *Bro. Abr. Amendment. pl.*
36.(d) *Dy. 105. pl. 16.*

have

have amended the record; and *a fortiori* they may well do so before error brought. For the last 300 years, therefore, until the year 1815, no difficulty has been found in granting these amendments; the officers find instances of them in every term. Every amendment of a recovery that is prayed for, is pursued throughout all the proceedings in the recovery, and is therefore virtually an amendment of the warrant of attorney, though that instrument be not expressly named, and brought to the notice of the Court. In the case of *Shaw (a), Demandant; Le Blanc, Tenant; Ramsay and Wife, Vouchees*; as also in the case of *O'Brien, Vouchee (b)*, this Court expressly permitted it. In the case of *James, Demandant; Williams, Tenant; James, Vouchee (c)*, as well as in the case of *Williamson, Demandant; Morton, Tenant; Layton, Vouchee (d)*, the Court allowed the *præcipe* of a warrant of attorney to be amended; which amendment consequently affected the operation of the whole instrument. If, however, adhering to the case of *For v. Bambo (e)*, the Court would not permit this instrument to be amended, he urged that they would at least permit the recovery to pass upon this warrant of attorney as it now stood, as was done in the case of *Forster, Demandant; Forster, Tenant; Davy Bolton and Wife, (f) Vouchees*. And there is no incongruity in the warrant of attorney to prevent the recovery so passing; for, inasmuch as it has been held in the case last cited, that the title of the plea named in the *præcipe* designates the plea in which the attorney is appointed, then, since the *præcipe* shews this to be a plea between *Morell, Demandant; Alban, Tenant; and Hatchett, Vouchee*; the subsequent words in the body of the warrant, expressing

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(a) *Ante* IV. 98.(b) *Ante* IV. 196.(c) *Ante* VII. 434. *S. C. 1 Moore,*
130.(d) *Michs. Term.* 58 G. 3.
Ante VIII.(e) *Ante* VI. 652.(f) *Ante* VI. 372.

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the plea to be between the vouchee and the tenant, are repugnant to the former; and the rule of construction is, that when in a deed a subsequent clause is repugnant to a prior clause, the prior clause must prevail, and the subsequent repugnant clause has no effect. It therefore will do no violence to any rule of law or construction, if the Court will permit the recovery to pass by virtue of the warrant as it now stands.

Cur. adv. vult.

The Court took time to consider the question until this day, and they now declared that they saw no reason to depart from the rule which they had laid down in *Fox v. Bembow*, and other cases; that they would not allow the warrant of attorney to be altered. That case was corroborated by the decision in *James, Demandant; Williams, Tenant; James, Vouchee*, where the like motion was made to amend the *præcipe*, (which in the printed report is inappropriately called the caption of the warrant of attorney), and was refused. They therefore held, that the amendment could not be granted. Neither would the Court suffer the recovery to pass under the present warrant of attorney, to do which, would, in substance, be the same thing as to amend the instrument. As the recovery was so recent, the parties might easily suffer another. The business was so carelessly done, that the application ought not to be granted and it was necessary strictly to watch these proceedings.

Rule refused.

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(IN THE EXCHEQUER CHAMBER.)

May 22.

DOE Dem. EARL OF JERSEY v. SMITH.

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench (a), given in an ejectment brought to obtain possession of certain lands in the

Devises for life, with a power enabling her, in consideration of marriage, to

revoke the uses limited to her, and to appoint to such uses and with such powers and provisos and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands, to hold to the use, after the marriage, of her husband for life *sans* waste, and after his decease to the use of herself for life *sans* waste, with remainder to divers other uses for the benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons, in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots which might be varied at will;) and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved; And, also, by indenture to demise any of the premises for any term absolute, not exceeding 21 years, in possession, and not in reversion, so as there were reserved so much, or as great and beneficial yearly and other rent and rents and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry in case the rents reserved were unpaid by the space of 28 days; And, also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding 31 years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent, as could reasonably be obtained without taking any fine, and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof, and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature.

The

(a) The arguments and judgment in the Court of King's Bench are not yet in print.

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The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after

the marriage, by indenture, in consideration of the former lease, and of 10s., and of the yearly rents, duties, payments, services, articles, covenants, provisos, and agreements thereafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2l. by equal portions at *Michaelmas* and *Lady Day*, with a couple of fat capons, or 1s. 6d. in lieu thereof at the election of the lessor, and also an heriot of the best beast, or 40s. in lieu thereof, upon the death of every tenant dying in possession, and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and multure as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2l. and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that if at any time the rent of 2l., and every or any of the duties, services, reservations, and payments thereby reserved, or any part, should be unpaid or undone by 15 days next over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises, or if the lessees should leave the premises in decay six months after view had and notice given, or should commit any wilful waste, or grind their corn at any other mill, (the lessor's mill being in repair) or if the lessees should assign without licence, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, then the lessor, and the person to whom the freehold of the premises should belong, might re-enter. Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture.

1. Held by four judges against three, that the clause of re-entry in the lease did not pursue the form required by the leasing power.

2. Held by three judges, that the evidence of the former leases was well received.

to appoint the same and the fee-simple thereof to such uses, and with such powers and provisoes, and in such manner, as was by her afterwards done by a deed of settlement, dated the 2d of *July*, 1757: that Lord *Mansel* died seised of the said lands on the 29th November, 1750, without altering his will, and leaving the said *Louisa Barbara Mansel* his only child and heir at law, who thereupon became seised in fee of the said lands. That the said *Louisa Barbara Mansel* on the 20th of *July*, 1757, intermarried with *George Venables Vernon* the younger, afterwards Lord *Vernon*, having previously, by a deed dated 2d *July*, 1757, and executed in conformity to the power for that purpose contained in the will of Lord *Mansel*, in consideration of her said marriage, revoked all the uses and devises in the said will contained concerning the said lands, and having appointed them to the Earl of *Guildford* and *Charles Montagu* and their heirs, to hold, to the use (after the solemnization of the marriage) of the said *George Venables Vernon* the younger, and his assigns during the term of his life, *sans waste*, and after his decease to the use of *Louisa Barbara Mansel* and her assigns for the term of her life, *sans waste*, and after the determination of those estates, or either of them, by forfeiture or otherwise, in the lifetime of *George Venables Vernon* the younger and *Louisa Barbara Mansel*, or the survivor of them, to the use of the same trustees, and their heirs, during the lives of *G. V. Vernon* and *L. B. Mansel*, and the survivor, in trust to preserve the contingent estates and uses, permitting the said *G. V. Vernon* the younger, and his assigns, during his life, and afterwards the said *L. B. Mansel* and her assigns, during her life, to take the rents and profits, and after the decease of the survivor of them the said *G. V. Vernon* and *L. B. Mansel*, to divers other uses for the benefit of the issue of that marriage, and also of the issue of *L. B. Mansel*, and in de-

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fault of such issue; to the use of such person or persons, and for such estates and interests, and to and for such ends, intents, and purposes, and subject to such powers, provisoes, conditions, and limitations over, and in such manner or form, either absolutely or conditionally, and with or without power of revocation, as *L. B. Mansel*, whether sole or covert, and notwithstanding her coverture, should by her last will and testament in writing, or any writing purporting or in the nature of her last will and testament, or any codicil or codicils thereto, to be signed, published, and declared, in the presence of three or more credible witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, or in case any such should be, when and so soon as the estates and interests thereby limited should respectively end and determine, and as to such parts of the premises whereof no appointment should be made, and in the mean time, and until such appointment should be made, and subject thereto, to the use of the said *L. B. Mansel*, her heirs and assigns for ever. That by the same deed it was provided, declared, and agreed, in the words following; viz. "that it shall and may be lawful to and for *G. V. Vernon* and *L. B. Mansel* his intended wife, from time to time during their respective lives, when, and as they shall respectively be in possession of, or entitled to the perception of the rents and profits of the manors, messuages, lands, hereditaments, and premises so limited to them for their respective lives as aforesaid, by indenture or indentures under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant such part or parts of the said manors, messuages, lands, tenements, and hereditaments, or parts or shares of manors, messuages, lands, tenements, hereditaments, and premises, whereof they shall be so respectively in possession, or entitled to the perception of the rents and profits

profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives; so as there be not on any part or parcel of the same premises to be demised, leased, or granted respectively, for a life or lives, or for years determinable on the dropping of a life or lives as before mentioned, any greater estate or interest subsisting at any one time, than what will wear out or be determinable on the dropping of three lives; and so as on every such respective lease, demise, or grant, for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable during the continuance of the estates and interest thereby to be demised, leased, or granted respectively, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, as now are, or, at the time of demiseing or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively, (except heriots, which shall or may be varied, altered, or compounded for, according to the will and pleasure of *G. V. Vernon* and *L. B. Mansel*;) all such rents, duties, and services respectively to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective demises, leases, and grants thereof; and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved; and so as the respective lessees, to whom such lease or leases

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shall be made as aforesaid, be not by any express clause to be contained in any such leases respectively freed from impeachment of waste, and so as the said respective lessees or lessee, to whom any such lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively: and also by indenture or indentures, under their respective hands and seals, attested as aforesaid, to demise, lease, or grant all or any of the said manors, messuages, lands, hereditaments, and premises so limited to them, *G. V. Vernon* and *L. V. Mansel*, for their respective lives, for any term or number of years absolute, not exceeding 21 years, to take effect in possession, and not in reversion, or by way of future interest; so as upon every such lease for an absolute term not exceeding 21 years, there were reserved and made payable during the continuance of such lease or leases, so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as now is and are therefore paid and yielded, or the best and most improved yearly rent and rents that can be reasonably had or obtained for the same, without taking any fine, premium, or foregift, or any thing in the nature of or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the said respective leases; and so as the respective lessees and lessee, to whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively, and so as in every such lease for any term of years absolute, respectively, there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days after the times thereby respectively appointed for payment thereof. And, also, by indenture

denture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments, and premises so limited to them the said *G. V. Vernon* and *L. B. Mansel*, for their respective lives as aforesaid, wherein or whereupon any mine or mines now is or are open, or wherein or whereon any person or persons shall be willing to open any mine or mines, sough or soughs, or other thing or things whatsoever, which may be requisite and necessary for the digging and getting of lead or copper ore, or any metal or mineral whatsoever, unto any person or persons for any term or number of years not exceeding thirty-one years, to take effect in possession, and not in reversion, or by way of future interest; and so as upon every such lease for an absolute term not exceeding thirty-one years, there be reserved and made payable during the continuance of such lease or leases, such part or share of the lead, copper, ore, coal, and other produce to be gotten from the said mines, or such yearly rent or income in respect thereof, as can reasonably be had or obtained for the same, without taking any fine, premium, or foregift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said respective leases; and so as the respective lessees to whom such lease or leases shall be made, be not by any express clause to be contained in any of such leases respectively, freed from impeachment of waste, other than in the necessary and reasonable winning or working thereof, and so as the said respective lessees and lessee to whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively, and so as there be also inserted such proper and usual covenants for the effect-

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ually winning and working the said mines, and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature. That by force of the last-mentioned deed, *G. V. Vernon*, after the marriage, became seised for life of the last-mentioned lands; that at the date of that settlement, and until the surrender made at the time of making the indenture next mentioned, and therein referred to, the lands in the declaration mentioned had been and were leased, and were under and subject to a lease to certain persons for a term of years determinable on the lives of three persons, who died before the day of the demise laid in the declaration. That after the date of the settlement and marriage on the 5th of September, 1803, *G. V. Vernon*, being so seised, executed, by his then name and title of Lord *Vernon*, an indenture of that date, between himself of the one part, and *Charles Smith* (since deceased) and the plaintiff in error, of the other part, by which it was witnessed, that in consideration of the surrender of the former lease, and in consideration of £105. paid to Lord *Vernon* by *Charles Smith* and the defendant, and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements thereafter specified and reserved, and by and on the part of the lessees to be paid, done, performed, and kept, Lord *Vernon* demised and granted to *Charles Smith* and the defendant, the messuage, tenement, and lands, with the appurtenances, from the day of the date for 99 years, if the lessees and *John Smith*, or either of them, should so long live, paying the yearly rent of £2., by equal portions, at *Michaelmas* and *Lady-day*, with a couple of fat capons, or 1s. 6d. in lieu thereof, at the election of the lessor; and, also, an heriot of the best beast, or 40s. in lieu thereof, upon the death of every tenant dying in possession, and the like upon every assignment, sale, forfeiture, or alienation; and, also, the lessees yielding and
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doing constant suit of mill, during the term, for all their corn and grain, which should be gotten and spent upon the demised premises, unto and at such of the mill or mills of Lord *Vernon*, his heirs and assigns, or such person or persons to whom the freehold or inheritance of the premises should belong, as he and they, during the term, should for that purpose direct and appoint, paying such toll and multure as others grinding their corn there should pay. That the lease contained a covenant on the part of the lessees to pay to Lord *Vernon*, his heirs and assigns, or to such other person or persons who should be entitled to the freehold and inheritance of the same premises, expectant in reversion upon the determination of the same lease, a proportion of the rents reserved, in case the term should determine between any of the days of payment by the death of the persons named in the same lease, and also covenants and provisoes in the following words: "And the lessees for themselves, their heirs, executors, administrators, and assigns, and for every of them, do covenant, promise, and agree, to and with the said *George Lord Vernon*, his heirs, executors, administrators, and assigns, and to and with such person or persons to whom the immediate freehold or inheritance of the premises shall as aforesaid belong, and to and with every of them, in manner and form following; that is to say, that they the lessees, their executors, administrators, and assigns; some or one of them, shall and will, well and duly, during the said term, pay, do, and perform, or cause to be paid, done, and performed, unto the said *George Lord Vernon*, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, and every of them, the said yearly rent or sum of two pounds, and the said duties, heriots, suits, services, and other the reservations aforesaid, and every of them, at the times, and in the manner above

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above limited and appointed for payment and performance of the same, or else the several sums reserved in lien thereof: Provided always, that if it shall happen at any time during the estate hereby granted, that the said yearly rent or sum of two pounds, and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same, and all damages thereof, (if any be) may be fully raised, levied, and paid, or if the lessees, their executors, administrators, or assigns, or under-tenants, or any of them, shall suffer and leave the said premises, or any part thereof, to continue in decay, or unrepaired, by the space of six calendar months next after such view had and notice given, or left as aforesaid, or shall do or commit, or cause or suffer to be committed or done, any wilful waste, spoil, or destruction in or upon the said premises, or any part thereof, or shall at any time during the said term grind any part of their corn or grain at any other mill than such mill so to be appointed by the said *George Lord Vernon*, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, (the same being in repair and order to grind such corn and grain,) or if the lessees, their executors and administrators, or any or either of them, shall at any time during the estate hereby granted, give, grant, bargain, sell, assign, or otherwise depart with this present demise and lease, or with their or either of their estate or interest therein, without the licence and consent of the said *George Lord Vernon*, his heirs or assigns, or of the person or persons to whom the freehold or inheritance of the

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the premises shall as aforesaid belong, in writing, under his or their hands thereunto first had and obtained; or if any default shall be by them the lessees, their executors, administrators, or assigns, made in the payment or performance of all or any of the reservations, covenants, and agreements, hereinbefore on their parts contained, that then and from thenceforth, in all, or any, or either of the said cases, it shall and may be lawful to and for the said *George Lord Vernon*, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and into every part and parcel thereof wholly to re-enter, and the same to have, hold, retain, possess, and enjoy, as in his and their former and proper estate, against the lessees, their executors, administrators, or assigns; these presents, or any thing herein contained to the contrary thereof in any wise notwithstanding." And, that no other than the above recited power of re-entry for non-payment of the rent reserved by the same indenture is contained therein; of which same indenture the lessees then executed and delivered a counterpart; and, that the several rents, duties, reservations, and payments reserved by the indenture of the 5th *September*, 1803, and secured by such render, covenants, and power of re-entry therein contained, were at the time of making the last-mentioned indenture the ancient and accustomed yearly rents, duties, and services, and then were as great and beneficial rents, duties, and services, as the yearly rents, duties, and services which at the time of making the deed of the 2d *July*, 1757, or at any time thereafter, previous to, or at the making of the indenture of 5th *September*, 1803, were or had been reserved, or made payable, or secured, for or in respect of the lands and tenements by the same indenture mentioned to be demised. And that the lands and tenements, with the appurtenances in the declaration

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claration mentioned, were and are the same lands and tenements, and that the usual and accustomed form of leases of the estates contained in the marriage-settlement of 2d *July*, 1757, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the indenture of 5th *September*, 1803; and, that all the rents, duties, and services reserved by the last-mentioned indenture, and which accrued in the lifetime of Lord *Vernon*, have been discharged and performed; and, that *Henry Smith* has been ready to pay and perform all sums, matters, and things, that would have accrued to this time, supposing the last-mentioned indenture to have continued in force and undetermined; and, that *Charles Smith* was since deceased, but that *Henry Smith* and *John Smith* are still living; and, that after the making of the last-mentioned indenture, and before the day of the Plaintiff's demise, *L. B. Mansel*, by virtue of the powers to her given by the deed of 2d *July*, 1757, duly made her last will and testament in writing, dated the 5th of *August*, 1783, signed, published, and declared by her, and attested and subscribed in her presence by three credible witnesses, and thereby devised the lands and tenements devised by the will of Lord *Mansel* to *L. B. Mansel*, subject to the estate for life of her husband therein, to *Thomas Earl of Clarendon*, for life, remainder to *William Augustus Henry Villiers*, afterwards *William Augustus Henry Villiers Mansel*, second son of *George Bussy Villiers*, Earl of *Jersey*, in fee; and on the 1st *January*, 1786, died, without issue, and without altering her will as to her devise of the last-mentioned lands and tenements with the appurtenances. That on the 1st *January*, 1787, the Earl of *Clarendon* died, whereupon *W. A. H. Villiers* became seised in fee of the remainder of the last-mentioned lands and tenements, expectant on the life of Lord *Vernon* therein.

And

And being so seised, by indentures of lease and release, of 4th and 5th *January*, 1812, conveyed the same to G. Earl of *Jersey*, *Edward Ellice*, and *Alexander Murray*; the lessors of the plaintiff, who thereupon became seised in remainder; and upon the decease of Lord *Vernon*, on the day of the demise alleged, became seised of the last-mentioned lands and tenements, with their appurtenances; in their demesne as of fee, and on the day laid in the declaration demised the premises to the plaintiff, and that the defendant entered and ousted him. But whether, &c.

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This case was twice argued: first in *Easter Term*, 1818, by *Littledale* for the Plaintiff, and *Gifford*, Solicitor General, for the Defendant, and again in *Hilary Term*, 1819, by *Jervis* for the Plaintiff, and *Moysey (F.)* for the Defendant.

For the Plaintiff it was argued, that this lease, granted by the late Lord *Vernon*, who was tenant for life of the estate in question, was not a valid lease against the remainder-man, because it was not conformable to the power contained in the settlement made previous to the marriage of Mr. *Vernon*, afterwards Lord *Vernon*, with the Honourable *Louisa Barbara Mansel*. By the deed of settlement of the 2d *July*, 1757, the respective tenants for life were authorized to grant several kinds of leases of different kinds of property, and amongst others, leases for lives, or years determinable on lives, of lands formerly let in that manner, under certain conditions and restrictions, and (amongst others) the following: "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." The lease (which is of the date of the 5th *September*, 1803,) contains a power of re-entry in the case of non-payment of the rent for 15 days, and there being no sufficient

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cient distress on the premises. First, it was to be considered what was the grammatical construction of the particular part of the power upon which the question arose; secondly, what was the meaning and intention of the creator of the power, as it was to be collected, first, from the words, secondly, from the object, of the whole power, considered both collectively, and in its separate parts; thirdly, the rule was to be found by which this power, and particularly the last-mentioned part of the power, was to be construed; fourthly, the proviso for re-entry in the lease was not conformable to the leasing power in the settlement, and was not only different, but not so advantageous to the remainder-man; fifthly, the evidence of the former leases, which was received to prove that the clause of re-entry in this lease was conformable to the usual and accustomed form of clauses of re-entry in leases of other lands similarly circumstanced, both prior and subsequent to the settlement creating the power, was not admissible for that purpose, and could not be taken into consideration by the Court in giving judgment; sixthly, and lastly, the Plaintiff's counsel examined the cases which had been decided on this subject, and anticipated the general arguments advanced on the other side, which did not range themselves under any of the foregoing heads. First, as to the grammatical construction of the words of the particular part of the power upon which the question arises. The words are by way of proviso or condition: — "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." In imposing this condition, the creator of the power had not used any word of reference; but he had used the indefinite article "a"—"a power of re-entry." This indefinite article, it might be said, means "some," "any," but it could not be contended, that the condition would be satisfied by the insertion in the lease of

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some, or any clause of re-entry of any kind whatever, and in any event, however remote and unlikely; that would leave too little a degree of restraint upon the person who was to execute the power; in fact, it would leave him under no restraint at all. But it would be said that the words of the power being general, "a power of re-entry," they meant "a," "or any usual or reasonable" power of re-entry; that the creator of the power required a power of re-entry, without saying what power, and that he therefore left it in the discretion of the tenant for life to insert in the lease any usual or reasonable power of re-entry. But this argument proceeded on an assumption which was altogether unfounded, namely, that the grantor required a power of re-entry, without saying what power; for he has said what power: he has said, that it shall be a power of re-entry for non-payment of rent, and he has not left any thing to the discretion of the person who is to execute the power. It is true he has expressed himself generally: he has indeed expressed himself so generally, to repeat his very words, that he has specified but one quality which he requires the power of re-entry to have, namely, that it should be for non-payment of rent; but his having imposed this one condition only, is certainly no reason why a compliance with that condition only should be dispensed with. The creator of the power has not said, it shall be the usual power; he has not said, that it shall be a reasonable one, but he has said, generally, that it shall be for non-payment of rent; and there ought certainly to be some very strong reason for so construing the power, as to dispense with the generality of the condition which he has annexed to its execution, and to substitute, in its place, a special or qualified condition, according to a discretion which he has not delegated nor entrusted to any one. Who is to judge of what is a usual or reasonable power of re-entry? Is the tenant for

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for life to do so? If he is, by what means is he to do so? Is it by reference to former leases, or to that which is generally usual, or generally reasonable? The creator of the power, by omitting to use words of reference to former leases in this particular part of the power, though he has used them in other parts of the power, has excluded all reference to former leases for this purpose. Is he to do so by reference to what is generally usual, or generally reasonable? Where is the criterion to be found? That which may be usual in one part of the country, may not be usual in another. That which may be usual generally, may not be usual on this particular estate. Secondly, as to what would be a reasonable time to allow for suspending the right of re-entry for non-payment of rent. If 15 days be a reasonable time, would 21 days, 28 days, 42 days, 60 days, be a reasonable time? In many places rents are only received one half year under another. In some great families the tenants are always allowed to retain a year's rent in hand; would an extension of the time to those periods be unreasonable? Is the Court to judge what is reasonable? If so, by what rule are they to do so? Is the jury to find the fact in every case? or is the question to be decided by the judges in every case as it shall arise? If so, case after case must be examined to ascertain the limits of what is reasonable, and the greatest confusion and uncertainty would be introduced into this head of the law, as has happened in the case of illusory appointments, in courts of equity (a); and the Court would too late have to regret in this case, as they did in those cases, that they ever deviated from the plain rules of simple grammar. The words which are used are also very strong:

(a) See the cases referred to in *Kemp v. Kemp*, 5 Ves. jun. 849.
Sugden on Powers, 484. et seq. *Butcher v. Butcher*, 9 Ves. jun. 382.

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they are "a power of re-entry," which import a right accompanied with the means of re-entry, not "a clause of re-entry," which is the word the creator of the power uses when he comes to speak of the leases at rack-rent, and which might, with greater plausibility, be argued to mean an authority to do the act, either under, or not under restrictions. Then the deed goes on to say, "for nonpayment of the rent thereby to be reserved:" the word "for" has precisely the same meaning as the word "on" would have had. "On," according to *Johnson*, in none of its senses, is a preposition denoting the time at which any thing happens. "For," according to the same authority, in one of its senses, means, "because of;" and according to *Mr. Horne Tooke* (a), "for" means "cause, and nothing else;" the word "for" therefore is synonymous, or nearly so, with the word "on" in the sense in which it is used in this place, at least it is as strong. A power of re-entry, "on" nonpayment of rent, would be a power authorizing re-entry on the happening of that event. A power of re-entry, "for" nonpayment of rent, would be a power authorising re-entry for the cause of nonpayment of rent; now, as the rent would be payable at some time certain, the happening of the event, and the cause for the re-entry, would both necessarily occur at one and the same time: the power of re-entry must attach at some time or other, and, in the absence of any direction to the contrary, it must attach at the same time when the cause for it occurs: upon the first point, therefore, the words, "a power of re-entry for nonpayment of the rent," means, first, a power which shall be general and absolute, and shall give a right of re-entry on the occurrence of the default; and, secondly, one which is unlimited and unlogged with any condition: but it is not necessary

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(a) *Divisions of Purley*, 2d. ed. vol. I. p. 366.

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for the purposes of this particular case to go the length of both parts of this proposition, it is enough to establish the second, namely, that it means one that is unlimited and unclogged with any condition. Next comes the consideration of the second question, viz. what was the meaning and intention of the creator of the power, as it is to be collected, first, from the words, and, secondly, from the object of the whole of the power, considered both collectively, and in its separate parts? And first, as to the words of the power: the power, it is to be observed, is threefold; it is for letting, first, at customary rents, secondly, at rack rents, and, thirdly, for letting mines. First, with respect to those parts of the estate which were then leased for life or lives, or for years determinable on the dropping of a life or lives; it authorises the granting of leases to any person or persons in possession, or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, under numerous conditions and restrictions, each of which is introduced by the words, "so as," "so as there be not more than three lives at once in each lease;" "so as there be reserved the ancient and customary yearly rents, duties, and services; or more, or as great or beneficial rents, duties, and services, or more, as then were, or at the time of demising the premises, should be reserved and made payable in respect thereof, except heriots," (which might be compounded for, according to the will and pleasure of the lessors;) now here it is to be observed, that where the creator of the power chose to make a reference to former leases, he has done so; where he chose to give discretion to the tenants for life, as in the case of heriots, he did it, but that, in exacting the power of re-entry, he neither refers to the former leases, nor to the usual clause of re-entry (if indeed there be any such thing),

nor does he use any words importing a discretion to be exercised by the several tenants for life; but he expresses himself absolutely, "a power of re-entry for nonpayment of rent," and he goes on with other absolute conditions in the same manner, "so as the lessees be not by any express clause freed from impeachment of waste, and so as they do seal and deliver counterparts of their leases." Then comes, secondly, the power of granting leases at rack rent, which is also subject to certain conditions and restrictions which are introduced by the same words, "so as the lessees be not by any express clause freed from impeachment of waste, and so as they do execute counterparts of their leases, and so as in every such lease for any term of years absolute respectively, there be contained" (not a power, but) "a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days, after the times thereby respectively appointed for payment thereof." Here it is to be observed, that where the creator of the power thought fit to extend the time for re-entry beyond the day appointed for the payment of the rent, he did it: he was therefore well acquainted with the practice of doing so in some cases, and he adopted that practice in this, which is the only case where he thought fit to do so. Thirdly, comes the power of leasing mines for 21 years. These also were to be leased, under certain conditions and restrictions, introduced by the same words, "so as the lessees be not by any express clauses freed from impeachment of waste, and so as they do execute counterparts of their leases, and so as there be also inserted such proper and usual covenants for the effectually winning and working the said mines, and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature." Now the material observation that arises on this part of the power is this,

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that in a former part of the power, where the settlor thought fit to do so, he referred to the former leases which would constitute a particular class or particular classes of cases, but that here he has referred to what is usual generally — on the words therefore, of the whole of the power, considered both collectively, and in its separate parts; from the settlor having in certain cases referred to former leases as to the ancient and accustomed rents, his having given a discretion as to heriots, his having in certain other cases, extended the time for re-entry till 28 days after the day on which the rent was made payable, and finally, his having in other cases referred to what was usual generally, it is impossible to argue for the annexing of any limitation or restriction, to any of the conditions which he has made in their terms absolute and general. *Expressum facit cessare tacitum*, could any limitation or restriction be imposed on the condition of tenants executing counterparts, such, for instance, as that there should be a tender of them on or before a particular day? could the right of re-entry which is extended to 28 days, be further extended to 42, or even to a single day beyond the 28? certainly not; and, yet neither of these would be greater deviations from the terms of the power, than the extending the time of re-entry where it is general, from the day when the rent would become due, till 15 days afterwards; and certainly not so great a deviation as the superadding to the power of re-entry the limitation or restriction that there should be no sufficient distress upon the premises. It is sufficient to say thus much of the meaning of the donor, as it is to be collected from the words of this particular part of the power, which must not only be allowed their fair and natural meaning, but must not be allowed more than their fair and natural meaning; but if we are at liberty to look from the words, to the object of the power, for the intention of the donor

donor of the power, it will not be difficult to find many reasons for supporting the construction for which the Plaintiff contends. Powers of leasing are, generally speaking, intended for the benefit of the estate, for the mutual advantage of the possessor and successor; but where conditions are imposed on the execution of them, they are so imposed either to protect the remainder-man from a charge in any other mode, or to protect the persons to whom the power is given, from a hasty and unadvised execution of it. Here the particular restriction under consideration was introduced for the benefit of the remainder-man. The power itself is extremely prejudicial to the remainder-man, it authorises the granting of leases, not only in possession, but in reversion, for three concurrent lives, or for 99 years determinable on three lives, at very small and inadequate rents, on the granting of which leases, the tenant for life is entitled to get what fines he can; there is, therefore, the strongest reason, as respects the remainder-man, why this condition should not only be general and absolute in its terms, but unclogged and unlimited with any condition. With respect to the rents, duties, and services, he uses a word of reference, "the *ancient* and accustomed yearly rents, duties, and services;" but in requiring a power of re-entry, he drops the words of reference, and uses words of an import, which disaffirms and excludes any such reference. Why then, it may be asked, did he so? Certainly the strong presumption is, that he did so, because he intended to do it; that he understood the language he was using. He appears to have had the former leases in his contemplation, and he may be supposed to have been dissatisfied with the clause of re-entry, which they, or at least some of them contained, and to have determined to have a new clause different from that contained in them, and which should enable the landlord to re-enter on a

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certain condition, not to be found in some of the former leases of the same land, or in any other specific class of leases, to which he chose to refer; and, having this object in view, what would be the language he would use? Would he not be driven from the use of any word of reference? And must he not have used the indefinite article "a," (which indeed always must be used when a particular class is not referred to), and must he not then have added the condition, on which he thought fit that the right of re-entry should accrue? Now, is not this the precise line of conduct, which has been pursued in the creation of this power? First the donor of the power says, the lease must contain a power of re-entry, and then he states the condition, on which that power is to be exercised, namely, on non-payment of the rent. That the donor of the power was dissatisfied with the clauses of re-entry in former leases, and annexed this condition to his leasing power, in order to introduce one more to his satisfaction, is not a matter of remote, and barely possible supposition; nor does it derive its probability merely from the remarkable fact of his having, after referring on several other occasions to the former practice, as soon as he came to speak of the power of re-entry, ceased to make such reference, and expressly stated the condition on which it should accrue; but it is strongly confirmed by the very nature of this kind of leases. Where the rent is of considerable value, or the property of small extent, a clause conditioned for re-entry, on failure of distress, is an adequate security for the rent; in that case, inasmuch as the distress would be insufficient, unless it were of a large amount, (since a distress of great value would be of great bulk and could not easily be concealed,) the landlord would have no difficulty in shewing that there is no sufficient distress. So, it would be easy for him to shew the defect of distress in a case where he has only a small

small extent of ground to search for it, and he will be in little danger of being turned round at the trial of an ejectment for a forfeiture, by proof of sufficient distress being on the land. But it is evident, that the value of the security for the rent diminishes precisely in proportion to the extent of the land, and the smallness of the rent; and where a farm of several hundred acres is let at a rent of *2l. per annum*, the security of a clause of re-entry only, in the absence of a sufficient distress, becomes, practically speaking, worthless. No prudent landlord would bring an ejectment for a forfeiture when he would be liable to be defeated, by his tenant shewing that there was, upon a space of many hundred acres (of wild open mountain for instance), a distress to the value of *1l.*, which is the half-year's rent. In short, an estate of 500 farms, let at *2l. per annum* each, would, with a strict clause of re-entry, be worth *1000l. per annum*, with a conditional one, it would be worth almost nothing; the rents would be scarcely worth collecting; certainly not by distress, where the *extra* expence of the distress would exceed the amount of the rent to be recovered. Another reason (and, as appears, a very strong one), for requiring the rent to be payable at the day, arising from the nature of the estate, is the importance to the owners of such an estate, of keeping up a constant recognition of tenancy by the leasees. Suppose the counterpart of the lease to be lost, and the tenant for life to have omitted for twenty years to receive the rent, how would the remainder-man be able to make out his title to the estate? He would be under considerable difficulties in doing so. This, it may be said, might also happen, if the clause of re-entry was not general and absolute, and if it was restrained and clogged with the condition of a deficiency of distress; it might so undoubtedly, but a clause authorizing a re-entry, only in the absence of sufficient distress, not

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being so penal and so strict as one which is unlimited and unclogged with such a condition, would not be so likely to be attended to as the latter, and to produce that constant recognition of tenancy which it was obviously the interest, and, as may fairly be argued, the intention also, of the donor of the power to keep up. Then, if it should be said, that this strictness cannot be contended for in the case of these small rents, because in the case of rack rents the time of payment is postponed for 28 days, it may fairly be answered, that the donor of the power presumed that the tenants must always be prepared to pay these small rents, and therefore required that they should be punctually paid; not only that there might be a constant recognition of tenancy, but in order that they should be paid with as little trouble as possible to the owners of the estate. Whereas, with regard to the rack rents, which it might be supposed the tenant would not always be ready to pay at the day, it was reasonable that an extension of time for 28 days should be given. It may, perhaps, also be said, that the construction of the power contended for by the Plaintiff is unreasonable and inconvenient; and, that it never could be intended by the donor of the power, inasmuch as its effect would be, that a tenant for lives, or for a long term of years, determinable on lives, might be instantly ejected the moment his 1st half-year's rent was in arrear; whereas upon the rack-rent being in arrear, on leases for years absolute, and where the rent might be of some valuable amount, the power does not allow of re-entry till after it should be in arrear 28 days; that consequently, it may possibly be said, the rigour of the rule would prevail to the extreme, where there was the least reason for it; but many reasons have been shewn why the rule should be extreme in the case of these rents, which are small and inadequate to the value of the premises, and the tenure is not of the degrading nature,

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which the argument assumes: the estate of a tenant, under such a lease, would be simply an estate upon condition, of which an instance is put by *Littleton* (a), and before the landlord could enter for the forfeiture, he must make a demand of the rent, on the day, and at the place, with all the formalities required by the common law; and the quality of the estate, whether degrading or not, would remain precisely the same, whether the right of re-entry were made to attach on the day after the default occurred, or were extended till after the expiration of the 15 days from that time. This argument indeed assumes too much;—it begs the whole of the question, and requires, not only that the power of re-entry shall be extended for fifteen days, but also that there shall be no power of re-entry at all where there is sufficiency of distress, which is directly contrary to the case of *Coxe v. Day*. (b) In addition, therefore, to the argument derived from the grammatical construction of the words of this particular part of the power, taken both collectively, and in its separate parts, it is clear that it was the meaning and intention of the donor of the power, as well from the words, as from the object of the power, that the right of re-entry in this particular case should be general and absolute in its terms, or at least that it should be unlimited and unlogged with any condition. Thirdly, let the rule by which, as it is conceived, this power, and, in particular, this part of the power is to be construed, be considered. The first question in the construction of powers, as well as of all written instruments, is, what was the intention of the parties? This intention is to be collected from the words which they have used; every word is to be taken according to its common and natural import, and indeed more especially according to

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(a) *Sect. 325.*(b) *10 East, 427.*

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its strict grammatical signification. If the words be clear, the rule with regard to powers in general is, that they are to be construed strictly according to their words. I am aware of various cases in which particular expressions, imposing restraints on powers, or modes of executing them, have received a judicial exposition, and in which the Courts, though they have said they cannot dispense with the form prescribed, have inclined to put a liberal construction on the words of the power: but no case, excepting that of *Hotley v. Scot* (a), can be cited, nor can any principle be extracted from any other case, which will warrant the construction contended for on the other side. That powers are in general to be construed strictly according to the words, when those words are clear, has been established by many cases, which are collected and referred to by Mr. Sugden, in his book on powers (b), wherein he refers to the authority of a decided case for every one of his instances; what was said by Lord Ellenborough C. J. in his admirable judgment in the case of *Hawkins v. Kemp* (c), is also well worth attention. But, perhaps, the strongest cases that can be cited upon this point, are those of *Wright v. Wakeford* (d), *Doe d. Mansfield v. Peach* (e), and *Wright v. Barlow* (f); in all of which, it was held, that under a power to be executed by writing under hand and seal, attested by two or more witnesses, a writing so attested as to sealing and delivery, but not as to signing, was not a good execution of the power, although in point of fact it was at the time of the execution and attestation, also signed by the party executing it; and such is the respect with which the conditions imposed by parties are regarded, that even the legisla-

(a) *Lofft*, 316.(b) *Sugd. on Powers*, 205.(c) 3 *Bast*, 439.(d) *Ante*, IV. 213.(e) 2 *M. & S.* 576.(f) 3 *M. & S.* 512.

ture, when they passed the act of the 54 Geo. 3. (a), for the express purpose of curing this defect, gave it only a retrospective operation, leaving the power, and the law applicable to its execution, such, as to all future cases, as it before stood. The observations hitherto made apply to powers in general; it will not need argument to shew, that powers of leasing are to be construed according to the intention of the parties. — That this is, and always has been, the only rule applicable to this subject, never has been, and never can be doubted; and Lord *Kenyon*, in observing upon it, in *Pomery v. Partington* (b), says, “If the Judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them; for in all the cases, they profess to determine upon the intention of the parties.” “It is not necessary (his Lordship added) to go into all the cases, because they are all arranged in *Douglas* (c), and the due effect given to them by Lord *Mansfield*, from all which he at last extracts the general rule, that the construction of these powers must be governed by the intention of the parties.” To apply this rule to the present case; this present power of leasing for lives, or years determinable on lives, in reversion as well as in possession, at small and very inadequate rents, and where a fine is paid to the lessor, though it may be beneficial to the tenant for life, is prejudicial to the estate, and to the interest of the remainder man; and any condition imposing a restraint upon the execution of such a power, is introduced for the benefit of the remainder man. It is therefore from this application of the rule, “that the intention of the parties is to prevail,”

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(a) C. 168.

(b) 3 T. R. 674.

(c) Doug. 364.

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to the subject-matter of this power, that the argument for the rule which, it is contended, is to be applied to the construction of this particular part of the power, namely, that it is to be construed strictly, is drawn. It is not put on grounds or reasons of equity or policy, for the Plaintiff adopts what was said by Lord *Mansfield* in the case of *Goodtitle v. Fumucan, Doug.* (a) "There is no ground or reason of equity or policy between the tenant for life and the remainder man for leaning on either side;" but it is to be put on the sole ground of the intention of the creator of the power. The nature of this particular power, as it affects the estate and the respective interests of the tenant for life and remainder man, has already been observed on, each of whom were equally the objects of the regard of the creator of the power. The condition is imposed by the words "so that," which words import a condition precedent, and a limitation, as was held even in the case of the Crown on the construction of stat. of 33 Hen. 8. (b) in the case of the *Attorney General v. Andrew.* (c) If this condition, therefore, were merely matter of form, the Court could not dispense with it, but it is not mere matter of form, it is more. In the case of *Fitzgerald v. Lord Rayconberg* (d), which was decided by the Lord Chancellor, assisted by the Master of the Rolls, and *Reynolds C. B.* the Master of the Rolls says (e), "In the exposition of deeds one general rule is to be observed, viz. the party's intention, so far as it stands with the rules of law, it will make "or" a copulative or disjunctive, it will give two negatives an affirmative signification, 1 *Inst.* 146. b. It is to prevail in the raising and direction of uses, 1 *Inst.* 49. a. In things of this nature it is principally to govern the construction, 1 *Vent.* 280. There has been

(a) 573.

(b) 33 H. 8. c. 39.

(c) *Hardr.* 23.(d) *Fitzgib.* 207.


(e) 219.

great variety of opinions in the construction of powers; formerly they were looked upon as odious, as tending to defeat the grant. The difference in *Englefield's case* 7 Co. 13. a. between personal individual conditions, which cannot be performed by any person but him that reserves them, and such which are not inseparably annexed to the persons, and so may be performed by any other, will hold in powers of revocation, which are in nature of conditions; another difference has been taken between a power, reserved to the owner of the estate, and a naked power granted to a stranger, which may charge a third person's estate. There is a difference also between a power reserved to the owner of the estate, and a power granted to the donee of a particular estate, as a power to tenant for life to make leases, which can have no foundation but in the will of the donor, and must be taken strictly in favour of a remainder-man, but the owner's power is to be construed liberally, as part of his ancient estate, *Kibbett and Lee, Hob. 312*. Yet that book says, that all circumstances and forms prescribed must be observed." So in *Orby v. Lord Mohun* (a) which was heard before Lord Keeper Cooper and the Chief Justices Holt and Trevor, where the power was to grant leases of all lands anciently demised, at the ancient rents, and of the other lands at the best rents that could be gotten. The power was exercised by two leases, by one of which all the lands not anciently let were demised, reserving thereon "the best improved rents" and by the other all the lands within the power were let, reserving the "ancient and accustomed rents," so that instead of specifying the sums to be paid as rent, the words of the power were repeated. Trevor C. J. after shewing how the reservation would be good, and the lease at all events

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(a) 3 Cha. Rep. 59. Sugd. on Powers, 2d ed. 613.

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good, whether the reservation were so or not, for the purposes of recovery by tenant in fee, says, "But in this case there must be such a reservation as may, or shall be, and is effectual to all intents and purposes, and must not be by any means uncertain, and by this lease the remainder-man possibly may, or may not be able, to ascertain and prove what is the ancient rent, and aver that such a sum as he avows for is the ancient rent reserved; so that he is under a necessity of doing all these things, and if he fails in any one of these, he cannot recover his rent, and it may not be in his power so to do, for it depends upon evidence, which is uncertain; and upon matter of fact, which is also uncertain; and it may be, the rents anciently reserved were not the same rents at all times, but sometimes greater, and at other times lesser rents reserved; and this power is over lands where fines have been taken, and consequently the rents must be more or less, according to the greatness or smallness of the fines; and no doubt on the trial the tenant may shew that another rent than what the remainder-man avows for was actually reserved, and so nonsuit him upon the evidence as often as he shall think fit to contest it, whereby he may come to lose his rent. And this is the first reason I go upon, that because of the generality of the uncertainty of such reservations of the rent, this lease cannot be good against the remainder-man." It is true that *Holt* Chief Justice differed from *Trevor*, and said (a), "It has been said that a power of this nature ought not to be taken favourably, it being in prejudice of the remainder-man; I confess I know not why; for if he that would have otherwise been tenant in fee, became tenant for life by such a settlement, whereby that power is reserved to him, that would have descended with the fee, it ought to be taken beneficially for him, and that power has a

(a) *P.* 69.

relish of the ancient fee," but he afterwards added (a), "Indeed he must pursue circumstances, and the form prescribed, as such a reservation, counterpart, &c." But *Cowper* Lord Keeper, differing in opinion with *Holt*, and agreeing with *Thevot*, said (b), "That the reservation and deed being to be made upon a restraint of the power, must be taken strictly against tenant for life; because of the limited acts he is to pursue, and liberally for the remainder-man, because that restraint was intended for his benefit; and there are multitudes of authorities in the books, that such a limited power must be taken strictly against the tenant for life; because, though the power be for the benefit of tenant for life, yet the restraints are put upon him for the benefit of the remainder-man; and if we should go on both the reasons together, it must still be taken for the benefit of him in remainder: and for this I insist on the reverse of the reason in *Mountjoy's Case*, 5 Rep. 3. 6. That was an estate tail created by Parliament, and he had a narrower power by the Act than the law would have given him as tenant in tail; therefore, that must have a reasonable construction according to the meaning of the Act; *vice versa* here the power of tenant for life is by way of enlarging the estate, and being in augmentation of it must be taken strictly, and so must it be taken according to natural reason: now according to that, this can't be a good lease to bind the freehold and inheritance of the remainder-man; for in construction of deeds, the true genuine sense and meaning of the parties must be attended to, so we must consider each part of the power in the deed." And in another part of his judgment, his Lordship says (c), "This lease as against the lessor is not void, but against the remainder-man it is void, because not so beneficial as usual, and a very

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(a) P. 70.

(b) P. 73.

(c) P. 75.

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minute difference will serve to avoid it, which might have been prevented in pursuance to the settlement, by reserving more than the ancient rent; but here is none; and if there be, it must have all the beneficial qualities of the rent anciently reserved; and those ought to be reserved and observed, as *Mountjoy's* case in the 5 *Rep.* says, and these several cases for want of that denied to be law, as silver for gold, or two rents or two manors conjoined, a part of the manor for an apportionable share or part of the rent; as if 20 acres had been set for 20l. each acre of equal value, it is not a good lease, if ten of those that were even be let at the rent of 15l. such a lease would be void." So in *Campbell v. Leach* (a), Lord Chief Justice *De Grey*, speaking of a power of leasing, said, "This power is of a mixed nature, not like a power of jointuring, or powers for raising money. But this is for the benefit of tenant for life and the remainder-man. If executing this power is for the benefit of the remainder-man, it should receive a liberal construction; but if tenant for life invades the interest of the remainder-man, in order to benefit his own only, it should have another construction." It would be very easy to multiply references upon this point, but it will be sufficient to advert to what was said by *Grant*, late Master of the Rolls, in the case of *Holmes v. Coghill* (b), which, though the facts of that case do not bear upon this, appears to be very applicable to the point under consideration. "Upon the second point, there is an evident difference between a power and an absolute right of property; not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be

(a) *Ambler*, 748.

(b) 7 *Ess.* 505.

considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner, and to the extent specified at the creation of the power. The compact is not to raise 2000*l.* absolutely, and in all events; but, that it may be raised in a certain manner, (*viz.*) according to his appointment by deed or will to be duly executed and attested by two or more witnesses. To say that without a deed or will, this sum shall be raised, is to subject the owner of the estate to a charge in a case, in which he never consented to bear it. The chance that it may never be executed, or that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement; and which no one has a right to take from him." According, therefore, to all the rules in the construction of powers, and the principle upon which those rules are founded, this particular part of the power ought to be construed strictly; and, consequently, the power of re-entry, which it requires, is one that is general and absolute and unlimited and unlogged with any condition. Fourthly, the proviso for re-entry in the lease is not conformable to the leasing power in the settlement, and is not only different, but not so beneficial to the remainder-man. The special verdict, after stating the lease in question, which was granted in consideration of a fine of 105*l.* for 99 years, if three persons should so long live, at and under the yearly rent of 2*l.* payable at *Michaelmas* and *Lady-day*, by equal portions, and other duties and services, proceeds to set forth, first, a covenant by the lessees to pay, do, and perform the said yearly rent of 2*l.* and the duties, heriots, suits, services, and other reservations at the times, and in manner therein limited for payment and performance of the same; and, secondly, the proviso upon which the present question turns. This proviso is twofold; first, it applies to the

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rent, and other reservations, for the payment and performance of which, particular times were appointed; secondly, it applies to the reservations, covenants, and agreements generally, for the performance of which no particular times were appointed. Very little argument is necessary to shew that the latter part of the proviso does not apply to the rent, and that, even if it did, it could not control the former part of the proviso. And, first, as to the proposition, that the latter part of the proviso does not apply to the rent. This question may be tried by this simple test. Suppose half a year's rent to be due to the landlord, could he, after making a legal demand, with the formalities required by the common law, maintain an ejectment for the recovery of the premises, if there was a sufficient distress thereon? It is quite impossible to contend, that such an ejectment could successfully be maintained, and that the tenant, who was expressly protected from forfeiture by a special clause, providing he should not incur it for non-payment of rent, while there was a sufficient distress in the premises, could be deprived of this benefit, given him by positive stipulation, by the general words of a subsequent proviso for re-entry on breach of covenant, although there is a covenant undoubtedly in the lease that he shall pay these rents, according to the reservation; and this would be the true construction, even if the subsequent proviso were more particular than it is, and were it even expressly contradictory to the first; and two well-known rules of construction would warrant this position; first, that in a deed where there are two clauses, of which the latter is contradictory to the former, there the former shall prevail, *Cotter v. Merrick* (a); and, secondly, "that subsequent clauses which are general, shall in deeds be governed by pre-

(a) *Hardr.* 89.

cedent clauses, which are more particular;" that rule is also laid down in the same book, but the extract is from *Thomas v. Howell* (a); but it is certainly laid down more correctly by Lord Coke, in these words:—" *Generalis clausula non porrigitur ad ea quæ antea sunt specialiter comprehensa* (b). But it is not necessary to have recourse to these maxims; the subsequent general clause will not be rendered inoperative, by giving the fullest effect to the previous special clause, it will still apply to the breach of the various other covenants and agreements contained in the lease. It is to be observed, that the word "rents" does not occur in this general proviso: the words are "reservations, covenants, and agreements;" at any rate, the general clause, when it speaks of "reservations, covenants, and agreements hereinbefore mentioned," must be understood to be providing a remedy by re-entry for the breach of such as had not been specially provided for before, or at least to speak of them, subject to all previously mentioned restrictions and qualifications. Enough probably has been said to shew that the effect of the special clause in this lease is not destroyed by the subsequent general proviso, and that the landlord having stipulated for a re-entry, only in the case of there being no sufficient distress on the premises, could not recover in ejectment for non-payment of rent, if there were a sufficient distress on the premises; and, consequently, that if the Court shall be of opinion that the condition annexed to the leasing power is not satisfied by a power of re-entry for non-payment of the rent only, in the event of there being no sufficient distress on the premises, the Plaintiff in error will be entitled to judgment. Next, as to the consideration of the clause for re-entry in the lease as compared with the leasing power in the settlement of 1757, an abso-

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(a) 4 Mod. 69.

See cases collected in 14 Vin.

(b) 8 Rep. 154. *Alibam's case*. Abr. tit. Grant. H. 13.

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lute power of re-entry on non-payment of rent is something different in effect and substance from a power to re-enter on failure of distress. On the first of these points, (that a qualified is substantially different from an unqualified power of re-entry), it would not be necessary to say any thing, were it not contended on the other side, that the qualified power of re-entry was as beneficial to the landlord as the unqualified one, the contrary of which proposition carries with it its own demonstration, the absolute power being clearly more beneficial to the landlord than the qualified power; but it is sufficient for the Plaintiff to shew that it is different. The creator of the power had a right to annex what conditions he pleased to his grant: it is no answer, when it is objected to a pretended execution of the power, that the conditions have not been fulfilled, to say, it is true the conditions have not been fulfilled, but something equally beneficial, to the party for whose benefit they were imposed, has been done; but it may be safely asserted, that this is not equally beneficial. Many cases may be put to shew that this qualified power of re-entry was not only different from, but not so beneficial as, a general power of re-entry, one, however, may be considered sufficient. Suppose the tenant for life to die after the day appointed for payment of the rent, and before the time limited for re-entry, the remainder-man would have no right to enter till that time; suppose him also to die after the day of payment, and before the time limited for the re-entry, he would lose the opportunity of granting a renewed lease, and the fine which he would have received thereon. But the difference between a general right of re-entry for non-payment of rent, and one clogged with the condition that there be no sufficient distress on the premises, is the great point. Where a lease has
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an absolute power of re-entry, the stat. 4. G. 2. enables the landlord to recover without proof of demand, if he can shew that there was no sufficient distress on the premises (a), and the common law enables him to recover after demand whether there be a sufficient distress or not; so that under such a power, that is, where the clause is an absolute power of re-entry, he has the choice of proceeding in either of two ways, and may recover whether there be a sufficient distress on the premises or not, whereas, under a qualified power of re-entry he cannot, either at common law or by the statute, recover without proving that there was no sufficient distress on any part of the premises; and he must prove that he has searched every corner of the premises to ascertain that fact, or he must fail in his ejectment, *Rees v. King* (b). This, certainly, is a very considerable inconvenience, and an imposition of a burthen on the remainder-man, which is not authorised by the power. Upon this point the passages cited from the judgment of Lord Chief Justice *Trevor* in *Orby v. Mohan*, are very important, as the difficulty imposed on the remainder-man in the way of proof is the main reason why the lease there was held to be void as against him. There is another passage at p. 62. which is also very much in point. The whole of what was said by Lord Keeper *Comper* is also expressly in point on this part of the case. In the case of *Coxe and Day* (c), Lord *Ellenborough* C. J., (in answer to the argument that the sole object of such a clause as the present was to secure the rent, and that if there were a sufficient distress that object was more immediately and effectually secured, than by re-entry,) interrupting the counsel for the Defendant, said, "In the one case it is to be se-

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(a) G. 28. s. 2.

(c) 13 *East*, 129.(k) *Forrest's Exchequer Rep.* 19.

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cured from time to time, by successive suits, with risk of sureties, if the distress be replevied; in the other it is secured once for all by the landlord's repossessing himself of the land out of which the rent is derived;" and again, (when it was said that in substance it amounted to the same thing; for that, at any time before the landlord recovered in ejectment for the forfeiture, the tenant coming in, and paying the arrears and costs, would be relieved,) his Lordship said, "Surely the direct power of re-entry is more beneficial to the landlord," and (where the 4 Geo. 2. c. 28. was urged) his Lordship again said, "The very provision of the legislature shews that there is a difference in this respect." To speak of this power in the lease, however, as being the power required by the settlement, but limited and clogged with a condition, is to treat the power in the lease more favourably than it deserves to be treated. It is neither actually nor *sub modo* the power required by the settlement. It gives no right of re-entry at all, if there be a sufficient distress on the premises, but puts the landlord to his distress or action, whether he will or no, for a sum not worth the expense of either of these modes of proceeding. Suppose a lease had been granted with a proviso in these terms, "Provided that if at any time during the term, there shall not be found on the premises cattle or chattels of any kind to the amount of 198*l*., the whole amount of the rent for the whole term of 99 years, the lesser may re-enter." The power of re-entry having no reference whatever to the non-payment of the rent, would certainly not have satisfied the leasing power; and yet if the lease in question be good, the supposed lease must be good also: it gives a power of re-entry in every case in which the lease in question gives it, and in some others. The Defendant is reduced to this dilemma: he is to contend that this lease, which does not enable the remainder-

man to re-enter for the non-payment of the rent, does yet contain a power of re-entry for non-payment of rent; not indeed an actual power, enabling the lessor to re-enter for the non-payment of the rent, but a reasonable and usual power, which does not enable him to do so, at least not in case there is a sufficient distress on the premises. Not a proximate and immediate power, but a remote and possible power of re-entry, which are undoubtedly two very different things: the argument is ingenious, but sophistical and unfounded. On this part of the case, therefore, the proviso for re-entry in the lease is not conformable to the leasing power in the settlement, and is not only different, but not so beneficial to the remainder-man. The next question is, whether the evidence of the former leases, which was received to prove, that the clause of re-entry in this case was conformable to the usual and accustomed form of clauses of re-entry in leases of other lands similarly circumstanced, both prior and subsequent to the settlement creating the power, was or was not admissible for that purpose? And this divides itself into two questions; first, whether, under the terms of this power, the Court has a right to judge whether this be a reasonable execution of it? and, secondly, whether the evidence which was received was admissible. The first point has been already considered under the first and second heads, namely, the grammatical construction of this particular part of the power, and the meaning and intention of the creator of the power, as it is to be collected from the words and object of the whole of the power considered both collectively and in its separate parts. But upon the second, this question being for consideration in just the same manner, as if it had been presented to the Court in the shape of a bill of exceptions, on the point whether such evidence were admissible or not, the Plaintiff contends that such evidence

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was not admissible, and cannot be taken into consideration by the Court in giving judgment. The learned Baron who tried the cause, when he received the evidence, invited the counsel for the Plaintiff to tender a bill of exceptions upon its admissibility, and this was acceded to; but it was afterwards abandoned, because it was properly conceived that the question of the admissibility of this evidence would, on this special verdict, equally be raised for the decision of the Court, as it would have been on a bill of exceptions. The Court will, therefore, consider the question in like manner as if it had come before them on the bill of exceptions. The proposition that this evidence was not admissible, depends upon a very plain principle, namely, that there was no reason for it. There is no ambiguity of any kind in the words of this particular part of the leasing power, nor any word of reference of any kind, to any other clause of re-entry either generally usual, or unusual, on this particular estate. Upon what principle then can any extrinsic evidence be admitted to explain that, which neither requires, nor admits of any explanation: if any such is admitted, it must be upon some principle, which will constitute a new head in the law of evidence. The cases in which extrinsic evidence has been held to be admissible, are either those where the expression is in itself ambiguous, which has been further restricted by a well-known maxim of law (which since the time of Lord Bacon has never been denied) to the case of a latent ambiguity which he defines to be, "*quæ ex post facto oritur ambiguitas*;" that is, first, either to the case where a will, for instance, on the face of it has but one meaning, but on some matter of fact being shewn, it appears to have two, as where a man devises to his cousin *A. B.*, and he has two cousins of that name, there, evidence is admissible to shew which is the cousin intended; or, secondly, to the case of the use of some words

words of reference, as if the creator of the power had said, "*the usual* power of re-entry for non-payment of rent." This special verdict contains no word of reference to any former or other powers of re-entry of any kind whatever, either in prior leases of this estate or in any leases of other estates; nor is there in the restrictive clause of the power any ambiguity, which can call for explanation to be derived from any other fact. There is this great inconsistency in the argument used for the Defendants, that while they place great reliance on the generality of the word "a," they say at the same time that the creator of the power, in using that general word, meant to refer to a particular class of leases, that is, to those formerly granted of the lands comprised in the deed of 1757. The argument, if it were good for any thing, would prove that the Defendant had a right to refer generally to the evidence of all other leases, of all other lands, granted according to some supposed custom of the country, which evidence indeed was tendered in this case, but rejected as it clearly was not admissible, according to the decision in *Doe v. Calvert*. (a) The question may be considered, first, on principle, and next on authority. The finding of the jury is, that the usual and accustomed form of leases which, whether before or since the making of the deed of settlement of 2d July, 1757, had been granted of any lands therein comprised, whether for lives or years, determinable on lives, contained a conditional power of re-entry, similar to that contained in the lease of the 5th September, 1803. This fact is altogether irrelevant: the creator of the power was owner of the fee, and might demise or deal with the premises in any manner he pleased. With regard to the leases which were granted subsequent to the settlement, what

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is it but arguing from the abuse for the right? Every fresh instance of a deviation from the terms of the power is equally liable to the same objection as any former deviation, and no number of deviations would constitute a rule of construction different from that which originally ought to have prevailed, or make that right, by a course of practice, which was originally wrong. So much for the principle upon which the admissibility of this evidence is contended for. On precedent, the case is equally weak: it stands on the authority of *Cooke v. Booth* (a), in which former leases of the same lands between the same parties were admitted to shew the meaning of a covenant for a renewal; but this case has been mentioned with disapprobation by every judge (as far as can be learnt from reported cases) before whom a similar question has since occurred. It is sufficient to refer to *Baynham v. Guy's Hospital* (b), *Eaton v. Lyon* (c), *Moore v. Foley* (d), and *Iggulden v. May* (e), *Same v. Same* (f), and same cause in error in this Court (g), in all of which books the authority of *Cooke v. Booth* is denied: so that, notwithstanding that case, the rule may now be taken to be, that extrinsic evidence, either of deeds or of any other matter of fact, is not admissible to explain an expression in a written instrument, unless there be either a latent ambiguity, such as I have before defined, or some word of reference. In the present case there is neither any ambiguity of any kind, nor any word of reference to any former lease, but on the contrary the exclusion of any such reference. The mischief which the letting in such evidence is calculated to produce would be infinite; the uncertainty which it would create, the danger to which

(a) *Cowper*, 819.(b) 3 *Ves. junior*, 295.(c) 3 *Ves. junior*, 690.(d) 6 *Ves. junior*, 232.(e) 9 *Ves. junior*, 325.(f) 7 *East*, 237.(g) 2 *N. R.* 449.

it would expose both the lessor and lessee, would be extreme. In the first place, it would not be enough for the tenant for life to look to his leasing power for his right to grant leases, but he must look back to counterparts of former leases for 50 or 100 years, to see that the leases which he is about to grant are conformable thereto; if he must do this, the remainder-man may, and if it should turn out that the lease was not in the usual form, it might be avoided, though it was wholly conformable to the strict words of the power: the tenant would never be safe; and as he could have no means of referring to former leases, he could never safely execute an assignment of his interest to any one. This jury has found, that the usual and accustomed form of leases of the estate contained in the settlement of the 2d July, 1757, granted¹ for lives, or years determinable on lives, as well prior as subsequent to that settlement, contained a conditional proviso of re-entry similar to that contained in the lease of the 5th September, 1803: they have not found that it was the uniform or universal, but the usual and accustomed proviso of re-entry in similar leases. They have not found that it is a reasonable proviso for re-entry. But an usual and accustomed proviso is not necessarily a reasonable proviso for re-entry: so far are these two from meaning the same thing, that they may perchance be directly opposed to each other; that which is usual and accustomed on this estate may be highly unreasonable, and even unusual, as applied to other estates. This finding was founded on the production of a given number of former leases: another jury might draw a different conclusion from the same evidence, or they might be furnished with a greater body of evidence, which would warrant a different finding. It is the interest of the personal representatives of the late tenant for life to support his act; because, if the lease which he has grant-

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ed should be set aside, they would be liable in damages to the lessee. It is in their custody that the possession of the counter-parts of expired leases is to be sought for; and they would be interested in keeping back such as would make against them, and in producing those only which would make for them. Is the remainder-man to be subjected to such an inconvenience, to such an act of injustice as this? The case of *Orby v. Mohun* is a direct authority that he is not. Upon the terms, therefore, of the power, which are not doubtful, upon every principle of the law of evidence, as applied to this subject, upon every principle of convenience and justice, the evidence of the former leases, which was received to prove, that the proviso for re-entry in this lease was conformable to the usual and accustomed form of leases of other lands similarly circumstanced, both prior and subsequent to the settlement creating the power, was not admissible for that purpose, and ought not to be taken into consideration by this Court in giving judgment. — Seventh head: Among the cases which more immediately bear upon this particular point, the principal is that of *Holley v. Scot (a)*, which is scarcely to be regarded as an authority for the Defendant; it is so loosely reported that it is difficult to understand the effect of the decision. The words of the report are, “in case of rent behind, or want of sufficient distress.” But it appears more correct to suppose that the phrase used was “and want of sufficient distress.” Lord *Mansfield* C. J. is made to say, “as to demand, a clause of re-entry is required as a security for the rent: demand is requisite both by common law and statute.” This expression, which his Lordship never could have used, is cited to shew the inaccuracy of the report. “A clause of re-entry,” continued his Lordship, “will never be allowed to operate farther

(a) *Left*, §16.

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than as a security for rent," a proposition which is not law. But the important observation arising upon this case is, that, according to the printed report of the case; Lord *Mansfield* does not appear to have adverted to the condition as to want of a sufficient distress, which certainly was the most difficult part of the case. The case of *Coxe v. Day* cannot be distinguished from the present: one of the questions there was, whether a lease with a clause for re-entry on non-payment of rent for 20 days, in case there was no sufficient distress on the premises, was conformable to a leasing power, which required a proviso for re-entry on non-payment of the rent for 21 days, unclogged with any condition; and the Court held that it was not, as being less beneficial to the remainder-man than an absolute power of re-entry on non-payment of rent. The authority of this case has not hitherto been disputed: it is admitted; that it would have been in point, had the question arisen on the second branch of the power, namely, the leases at rack-rent: how, then, is it less in point on the first, excepting that this is a stronger case, inasmuch as in this case there is a deviation from the terms of the power, not only because the same condition is here annexed which was annexed in that case, but, also, inasmuch as the time for the re-entry is extended. It appears, upon inspection of the briefs in that cause, that the bill was filed by the next in remainder after the lessor, for a declaration that the lease was not executed according to the leasing power in the settlement, and for an account, and that the Defendant might be restrained from setting up a term of 500 years to defeat the Plaintiff's claim at law. On the hearing, the Master of the Rolls directed a case to be stated for the opinion of the Court of King's Bench; and so satisfied were the Defendant's counsel with the decision of that court, that when the cause came on again to be heard on the equity

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equity reserved, they gave it up, and the cause was compromised. An argument may be urged of the supposed inconvenience of adopting the Plaintiff's construction of the power, arising from the circumstance, that many leases are said to contain powers of re-entry similar to that in the Defendant's lease. This argument is not applicable except in the case of leases made under powers, containing a similar restriction to that contained in the deed of 1757, and in no case is it of much weight. To find that in any particular district of *England*, there is not only a custom of leasing with such a clause of re-entry, but also a custom for great landholders to insert in their marriage-settlements a leasing power restricted similarly to the present case, must be an extremely rare coincidence. The argument drawn under the fifth head from the supposed hazard to which the tenant would be exposed, should the Plaintiff's construction be adopted by the Court, is fully counterbalanced by the utility of avoiding the uncertainty, which would be introduced into an important point of law by overruling the decision in the case of *Coxe v. Day*, in which all the judges of the Court of King's Bench concurred; for that case is wholly inconsistent with the late decision made by two judges only of that Court, in the present case (a); the lease in question, therefore, is invalid, as not conforming to the power contained in the settlement, and the lessor of the Plaintiff is entitled to recover.

For the Defendant it was argued, that the lease in question contained two clauses, the first more special, and the last a sweeping or general clause; as to the first, the expression "*for non-payment of rent*," contained in the leasing power, refers not so much to the time of the rent falling in arrear, as to the cause or

(a) Two of the judges having been of counsel in the cause, delivered no opinion thereon.

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ground upon which the right of re-entry was to be secured; whereas, if the words had been "on non-payment," &c. they would rather have had a reference to the time; and Lord *Ellenborough* C. J. was of that opinion. Again, the term "clause of re-entry," contained in the leasing power, as to leases at rack-rent, implies something more definite in form, which the donor of the power intended to mark out, as applicable to leases for short terms; whereas the term "power," as applied to leases at a nominal rent, is general, and implies a latitude and reasonable discretion according to the subject-matter. It is clear, that the general or sweeping clause at the end would include the non-payment of rent, in case there were no previous special clause upon the same subject; but it is argued that they are repugnant to each, on the general maxim, *Generalis clausula non porrigitur ad ea que antea specialiter sunt comprehensa*. This, however, presupposes an express and special clause of re-entry upon the very subject-matter, without which the general clause would necessarily apply; therefore, that the special clause is a clause of re-entry for the non-payment of the rent reserved, is contended as much by the Plaintiff as it is on the part of the Defendant, and that such a special clause exists is all that is contended for on the part of the Defendant. The words, then, of the power being *prima facie* complied with, it must be shewn, on behalf of the Plaintiff, that it is not a compliance with the meaning. But a power of re-entry is not the less a power of re-entry because it is qualified. Would it be denied that a leasing power is here given to the tenant for life, because it is so qualified as to restrain him from making leases until he comes into possession, or from granting any new lease so long as three lives continue to exist upon the property? This qualified right of re-entry gives to the remainder-man all the benefit intended by the creator of the power, and required by the general words and intention

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tion on his behalf. To prove that an immediate unqualified re-entry was intended, *Littleton*, s. 325., is cited; but he there merely professes to give several examples of an absolute condition of re-entry, and not two remote instances distinct from each other. But it appears from *Littleton*, s. 327., that the distinctions taken by *Littleton* and *Coke*, and *Comyn* (a), between an absolute or general, and a qualified or special right of re-entry, are quite different, and have nothing to do with the present question. The well known clear distinction is between a general condition, that the lessor shall re-enter, and a special condition that he shall enter and hold until payment, &c. It is laid down as a rule for the construction of powers in *Sheppard's Touchstone* (b), that the construction be reasonable, and according to an indifferent and equal understanding: and so in *Hill v. Grange* (c), the Court say, "it is the office of the judges to take and expound the words, which the common people use to express their meaning, according to their meaning:" usage and popular understanding are, therefore, the principles of construction. If, therefore, it could be shewn, that the special clause of re-entry were unheard of, extravagant, or perverse, the meaning of the leasing power would not be complied with, whereas it is a clause in common and popular use. If the leasing power had directed that the lease should not contain a power of re-entry, would not such prohibition have been violated by the lease in question? and the only difference is this, that there, if the reasonable and ordinary meaning were broken through, it would not be an answer for the Defendant, to shew that the clause was extravagant or absurd; but in this case a performance, if absurd and perverse, would not be sufficient, although within the literal meaning of the words. The Defendant con-

(a) *Co. Dig. Tit. Conditions*, (b) *P. 86.*
O. 3. (c) *Plowden*, 170.

tends, for a reasonable construction of the power expressed as it is in general terms, and is not touched by any unreasonable or extravagant cases which may be suggested on the part of the Plaintiff. If a landlord were to persuade his tenant to accept such a lease, under an assurance, that it contained no clause of re-entry for non-payment of rent, would he not be guilty of a gross fraud, according to common apprehension and the use of terms? The Defendant is not bound to contend, that this is the only clause that could be a compliance with the power; but that the words being general he is within their fair, and ordinary, and reasonable interpretation, as the law will expound them. *Cotter v. Merriak* (a). The cases of *Kemp v. Kemp* (b), and *Butcher v. Butcher* (c), do not apply, as used by the Plaintiff's counsel, inasmuch as it is the Plaintiff who would limit the latitude of the general expression, and confine it to a peremptory clause of re-entry. In *Butcher v. Butcher*, the question was, whether an appointment of 200*l.* stock was, or was not illusory: the general doctrine there laid down is well worthy the attention of the Court. In that case, the Master of the Rolls says, "It is impossible to have considered a case of this kind, without wishing, that judges in equity had either never assumed control over the execution of discretionary power, or had laid down rules, by which their successors might be guided." The Plaintiff here, wishes the Court to assume control over the discretion which, it is contended, the general words allow to the Defendant. "To say, that under such a power an illusory share must not be given, or, that a substantial share must be given, is rather to raise a question than establish a rule." So here, to say that under such general words as these are, a qualified power of re-entry must not be given, is only to raise a question, not to establish a rule. "Whence is the intention collected? not from the words, for they are purely dis-

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(a) *Hard. Rep.* 89. (b) 5 *Vesey*, 849. (c) 9 *Vesey*, 393.

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cretionary. But a conjecture is made that the party creating the power would not have approved of extreme inequality." Here, the Plaintiff conjectures, that a party using the words would not have allowed of any indulgence. "The party might have prescribed any limits he thought proper." The party, here, might have prescribed any form of re-entry he thought proper; "a latitude might have been given quite sufficient for the purpose of creating the dependence, which is frequently intended; and yet boundaries might have been prescribed:" "if that is not done, it is either because the party had no wish to fix any limits, or because he was unable satisfactorily to himself to fix upon the limits which under all the circumstances might be proper." Either view of it may very probably apply to this case. "Upon either supposition," the Master of the Rolls says, "why should this Court attempt to do what the party in the exercise of his own judgment, relative to his own acts, has abstained from." Why should the Court, in this case, attempt to limit these general words, to one immediate, peremptory, and unsparing clause of re-entry, when the party exercising his own judgment, as to his directions regarding the management of the property, has directed no such clause? "Why is this Court to say there is a limit not to be transgressed, under the penalty of making the whole void," (exactly what is now contended for by the Plaintiff,) "by an arbitrary rule having no principle to rest on, having no foundation in the intention of the party, disclosed, or apparently presumed?" The observations of Lord *Ellenborough* C. J. in the Court of King's Bench, in this case, coincide with this view of the question. His Lordship there said, "The power is silent as to the time when it should be carried into effect, and being so silent, why should it not, in virtue of such silence, be intended that the creator of the power thought it enough to require, that there should be some reasonable power of

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re-entry for non-payment of rent upon every lease; leaving it to the discretion of the person, by whom it should be granted, to prescribe when, and under what circumstances, that power of re-entry should in each particular case be enforced; by requiring that the leases should always contain a power of re-entry, he calls the attention of the successive lessors from time to time to the subject, whenever the occasion of leasing should recur; and when the attention of the lessor is called to it, it is hardly likely, that he should, in the exercise of a proper discretion, introduce into his lease so harsh and rigorous a provision." In the cases of *Wright v. Wakeford*, *Doe v. Peach*, *Wright v. Barlow*, and *Hawkins v. Kemp*, which have been cited, some specific mode or form, or other precise circumstance, is pointed out; but here this question arises on the construction of general words. In *Orby v. Mohun* (a) the fair and common construction required distinct leases, reserving distinct rents, and the remainder-man was placed under incalculable difficulties by the mode of leasing there adopted, which the judges held to be rather a delegation than an execution of the leasing power. In all the cases, from *Mountjoy's* case (b) to the present time, wherein leases have been set aside, there has been either a palpable trick or fraud, or a departure from some prescribed form, mode, or circumstance, or from the ancient and accustomed course expressed or implied; or in case the Court could not say whether such course was required or not, it has been held necessary for the tenant for life, having made an innovation, to shew that he had not thereby placed the remainder-man under greater disadvantages than in former times; but the lease in question cannot be impugned on any of the above grounds. It is admitted that where any thing precise is required, it must be done as

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(a) 2 *Vernon*, 531. & 542.(b) *Moor*, 174. S. G. 4 *Leon*.
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in *Darlington v. Pulteney* (a); Mr. *Kenyon* there says, and Lord *Mansfield* afterwards adopts his argument, that powers are of three kinds; first, naked powers, unaccompanied with any interest, and the construction of them has been very rigid; secondly, powers granted to the donee of a particular estate, which were formerly construed strictly in favour of the remainder-man, but no further, and of late more liberally; thirdly, powers reserved by the donor to himself, which have always been taken largely, and of this class is the present power. In that case Sir *William Pulteney* devised to his grandson, the Earl of *Bath*, for life, remainder to his first and other sons in tail, with divers remainders over; but though, before the recovery suffered in that case, the Earl of *Bath* was not absolute owner of the inheritance, yet, after the recovery, he became so. In this case Lady *Vernon* originally had only an estate for life, but with power to revoke all the limitations of her father's will, which she did, and appointed a life-estate to her husband and to herself, if she survived him, with an ultimate remainder to herself in fee. She is therefore a person generally interested in the property, either as owner, or as acting on behalf of the owner, either by virtue of her own power, or under a power from her father, the owner of the estate. Lord *Mansfield* says, in the same case, that courts of law originally compared powers to conditions which they are not at all like, and consequently held that they should be construed strictly, whereas in fact they are only a different species of ownership and enjoyment of property. Lord *Mansfield's* observations are to the same effect in *Zouch v. Woolston* (b), and the Solicitor-General, in *Hearle v. Greenbank* (c), says, that courts of law considering powers coupled with an interest as modes of ownership, construe them liberally. And in *Orby v. Mohun* (a), it is said, that the intent "was to give a power

(a) *Cowper*, 263.

(b) 2 *Burrow*, 1136.

(c) 3 *Atkyns*, 703.

of leasing in a reasonable manner, as leases fell in, and for keeping of the estate tenanted, as the owner of an estate would be supposed to do." Here it is admitted, that the intention is to govern, but it is argued on the other side that such intention is always to benefit the remainder-man. In *Goodtitle v. Fumcan* Lord Mansfield says, "There is no ground or reason of equity or policy between the tenant for life and the remainder-man for leasing to either side (b);" and as to the observations of De Grey C. J. in *Campbell v. Leach* (c), can the tenant for life in this case be said to have invaded the interest of the remainder-man to benefit his own? The general object in creating such a power is the good management of the estate, which is emphatically the benefit of the remainder-man. Had not the tenant for life the power of granting a permanent interest, no capital would be invested in extended improvements of the property, and the estate would descend to the remainder-man barely, perhaps, in repair, for the tenant of a precarious interest can feel no attachment to the land. It is the permanency and security of an interest which will descend to his children, that justifies a tenant in draining, planting, building, and other improvements, and by diminishing this security, you crush his liberality of spirit. This is the well understood interest of the remainder-man. To construe the power otherwise, would be to put a particular construction on general words, in violation of the general object for which such power was created. It would be more difficult to let the estate to a respectable and opulent tenant, with a peremptory clause of re-entry, than with such a modified clause as is now contended for. If it would, what correspondent benefit would accrue to the landlord? No man would choose to risk the loss of his property, or the expence of a law-suit, because he might chance

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(a) 2 *Vernon*, 531.(b) *Douglas*, 572.(c) *Ambler*, 748.

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to omit the payment of a nominal rent on the very day on which it became due. Could Lady *Vernon* have considered this rigorous clause as the indispensable condition of a lease, although the distrainable property on the premises were ever so large? The arguments on the other side consist in barely possible cases. Can it be difficult to ascertain, whether there is a sufficient distress for a guinea on the premises, while there is a sheep on the hills, or a table in the house? If the premises are apparently vacant and deserted, an ejectment may be served; and this, notwithstanding the possibility of some distrainable goods being still on the premises; for C. B. *Comyn* (a) says, "If a condition be to re-enter if no distress be found, this shall be expounded of a reasonable distress, and therefore if a locked cupboard remains there, he may enter." This sort of qualification of a clause of re-entry appears to have been in use in the time of Queen *Elizabeth*, and it may also be found in *Grygg v. Moyes* (b), and *Wood v. Germans* (c). As to the possible difficulty arising from the want of sufficient sureties, that is an argument derived from the case of *Coxe v. Day*, the Plaintiff's counsel forgetting the difference of the subject-matter; that was the case of a lease at rack-rent, whereas here the rent is only a guinea. But the authority of *Coxe v. Day* is directly opposed by *Hotley v. Scott* (d), from a MSS. note of Mr. *Butler*. There the power was to lease for any number of years, with a proviso if the rent should be behind for 21 days, then to re-enter. The condition in the lease was, if the rent should be behind for 21 days, and no sufficient distress then, &c. Lord *Mansfield* said, "The clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent. By sta-

(a) *Dig. T. Condition*, p. 87.(b) *Croke, Eliz.* 764.(c) *Croke, James*, 390.(d) *MS. note, penes C. Butler*,*Esq. S. C. Loft.* 316.

tute it cannot be without distress," and judgment was given for the Defendant. In *Coze v. Day*, a specific clause of re-entry was directed, and the indulgence to be given to the tenant was pointed out, viz. 21 days were allowed him after the rent became due; but in this case the rent is merely nominal, and the words of the power are general and undefined. In a case of rack-rent, the landlord does not speculate upon improvements to the estate. The rent is every thing, and a peremptory power may be more beneficial to the remainder-man. In the case of nominal rents, there is no real probability that the tenant will refuse to pay his rent. It is objected that the tenant for life may die between the day on which the rent becomes due, and the period allowed him before re-entry, but in this case his executors will be entitled to the rent, and the remainder-man can have no benefit of the condition for non-payment of rent, which never became due in his time. As to the chance of forfeiture, of which the remainder-man is deprived, and the case of *Holmes v. Coghill* (a), it is not contended that the power is not to be executed in the manner directed, as far as it is directed, but, that general words are to be interpreted according to the probable intention of the creator of the power. It appears from *Smith v. Parks* (b), and *Phillips v. Doe-little* (c), that the practice of relieving a tenant in cases of re-entry for non-payment of rent on bringing the money into Court, and payment of costs, was established before the 4 G. 2. c. 28. Suppose, therefore, the landlord to have the common law re-entry and to proceed in ejectment, the Court will relieve the tenant as before, on payment of costs, and the whole proceeding will be nugatory, as to the recovery of the land. In the leasing power there is a marked difference between the two powers of leasing for rack-rents,

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(a) 7 Ves. 499.

(b) 10 Mod. 383.

(c) 3 Mod. 845.

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and at nominal rents. In the one case a precise form is given; in the other, there is only a general requisition sufficiently complied with by the clause before the Court. It could never have been intended that the tenants should be distressed and harassed about this nominal rent, to the discouragement of the spirit most beneficial to the remainder-man. No attorney would venture to put into a lease this disadvantageous clause without express directions so to do, but would refer to the old leases. The same leasing power is given to Lady *Vernon* as to her husband, and the same reasoning, and the same and no greater restriction, will therefore apply in either case. The power is to lease lands then leased for lives in possession or reversion, her father being then dead. Can it be presumed that Lady *Vernon* meant to treat the old tenants in this rigorous manner? She directs the ancient and accustomed rents, duties, and services, or greater, to be reserved. Could she reasonably expect to obtain them, coupled with this new peremptory and imperious clause? She then excepts heriots, which she expressly permits to be varied at discretion. True: but if the general words of the power here, necessarily imply a discretion, there was no occasion for her to mark it farther. But it is said Lady *Vernon* intended to make an alteration in the old clause of re-entry. Then why did she not express it here, as she does just before, where she is deviating, as to heriots, from the old and accustomed course? Either Lady *Vernon*, by her general expressions, left a discretion to insert any reasonable clause of re-entry with reference to the subject-matter, or, inasmuch as she directed no variation, and moreover required the ancient and accustomed rents, it may fairly be presumed, that she intended also the ancient and accustomed clause of re-entry to accompany them. Having thus argued the construction without calling in aid the evidence, and having shewn that either a discretion is allowed, or the old clause probably con-

contemplated by the power, the finding of the jury must now be resorted to. For, if the construction imports that there is to be a reasonable power of re-entry, what so reasonable as what was always usual? If the accustomed clause was intended, the accustomed clause must be proved to be that used. In one view the evidence was proper, in the other indispensable. It was so offered, and so received, not to shew the construction; and the cases of *Iggulden v. May*, &c. have no application. As to the sweeping or general clause at the end of the lease, it has clearly words sufficient to embrace the non-payment of rent; but it is said that the latter clause can have no operation as being repugnant to the first or special clause. But in *Sheppard's Touchstone* (a) it is laid down as a maxim, that if there be two clauses of a deed repugnant to each other, the first shall stand and the last be rejected, except there be some special reasons to the contrary, which unquestionably exist in this case, namely, *ut res magis valeat quam pereat*. The maxim, *generalis clausula non porrigitur ad ea quæ antea sunt comprehensa*, does not apply, as it presupposes the existence of a valid and operative special clause providing for the subject-matter, whereas, it is contended in this case by the Plaintiff, that the first clause is null and void; and if so, it can have no operation to exclude the second clause. Just so the maxim "*Expressum facit cessare tacitum*" does not apply. Where the express contract is unavailable between the parties, as for non-compliance with the stamp laws, an implied contract may then be resorted to. If the remainder-man enters under the general clause for non-payment of rent, the tenant, by setting up the first clause as repugnant to it, would, according to the Plaintiff, vacate his lease. If so, to avoid that evil he must necessarily submit to the general clause; because then he may save his possession by bringing in his rent, and

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(a) P. 88.

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staying the ejectment. It is said that the Plaintiff has not the common law right of re-entry, but must proceed under the statute 4 Geo. 2.; but if the special clause applies to proceedings under the statute, the general clause, which contains no qualification, must apply to those at common law; and the Court will give effect to both clauses, by construing one with reference to the statute, and the other as giving the common law right of re-entry, and thus the deed will have the greatest possible effect. (a) The inconsistency in this case between the general and special clauses is not greater than in *Goatly v. Payne* (b), between a covenant to repair generally, and a special covenant to repair within three months after notice. The landlord there re-entered after notice, and before the expiration of three months, and it was held good. The meaning of a sweeping clause is, that if any necessary particular be omitted, or fail to be effectually provided for, this general clause may catch up the subject and provide for it. On the whole, the question must be decided on general views of the intention of an owner of an estate consulting the probable and solid advantages of the property, as well as the fair and liberal treatment of the tenant.

In reply it was urged, that the argument for the Plaintiff rested mainly on two propositions; first, that the leasing power required an absolute power of re-entry in the lease, unlimited as to time, and clogged by no condition; and, secondly, that the lease in question gave no absolute power of re-entry. The counsel for the Defendants have addressed themselves but slightly to the last proposition, which is that on which the Court most required to be satisfied, and have considerably laboured the first. The leasing power is

(a) *Sheppard's Touchstone*, 87.
 and *Pugh v. Duke of Leeds*. 2
Cowp. 714.

(b) 2 *Campbell*, 520.

first construed by the Defendant as not containing an absolute power of re-entry; and, secondly, as containing an absolute power of re-entry. There is, undoubtedly, a power of re-entry in the event of the rent being in arrear 15 days, and no sufficient distress upon the premises, and this is not an absolute power; there is also a general power of re-entry. The counsel for the Defendants distinguish what may be done under each of these powers of re-entry, and say, that the landlord is bound to demand the rent on the land, upon the rent day, with the formalities of the common law; and, that if it is not paid on the last moment of that day, he has a right to bring his ejectment, notwithstanding the 15 days are expired, and notwithstanding there is a sufficiency of distress on the premises. But, say they, the landlord may have omitted to make his demand according to the formalities prescribed by the common law, and therefore he may have recourse to the former proviso for re-entry, and he may then, at the expiration of 15 days, if there be no sufficient distress upon the premises, maintain his ejectment upon the former part of the proviso. But the landlord might do that, if the former part of the proviso had not existed, because he might bring his ejectment before the 15 days by the 4 *Geo. 2. (a) Roe, Dem. Goatly, v. Paine (b)* is a direct authority against the Defendant; for, by reminding the Court of the principles by which written instruments are to be construed, a principle will appear applicable to this case, by which the Court is bound to reject the latter part of the proviso. The most general rule is, that the intention of the parties, to be gathered from the words of the instrument itself, is to prevail; all other rules are auxiliary to that main rule. Next, if there be two inconsistent clauses in a deed, the first is to prevail, and the last is to be rejected; this is rather a rule of convenience

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(a) 4 G. 2. c. 28. s. 2.

(b) 2 *Campb.* 520.

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and of necessity than a rule founded on any substantial reasoning. The next rule is that laid down in *Altham's* case. (a) "*Generalis clausula non porrigitur ad ea quæ antea specialitèr sunt comprehensa.*" This rule is applicable generally; and Lord Coke thus applies it, "If the general words should stand without any qualification, then the special words would be altogether vain and of no effect;" and again, "where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words." In *Butler v. Duncomb* (b), Parker Ch. says, "Surely it is a rule both in law and equity, so to construe the whole deed or will, as that every clause should have its effect." Now if the Court construes the latter part of this latter clause, as containing a power of re-entry, it will nullify the preceding clause. Is it probable that a lessor, intending to secure to himself an absolute power of re-entry for non-payment of rent, in addition to the conditional power of re-entry, should attempt to express this by a clause, in which the word rent does not at all occur? The word "reservations" applies to many other things besides rent, such as services, and the like. Every advantage, which could be given by the special clause of re-entry, is found in the general power of re-entry; nay more, for under the last there is no need of waiting 15 days. In *Roe, Dem. Goathy, v. Paine*, the principle on which the decision proceeded was the necessity of giving effect to distinct and independent clauses; and in that case the proviso for re-entry could have no effect at all, unless it were held, that the party had a right to recover on that clause. Lord Ellenborough C. J. there says, "The indenture contains a general covenant to keep the premises in repair. By breach of this, the lease was forfeited, and

(a) 8 Co. 307.

(b) 1 P. Wms. 457.

the notice was no waiver of the forfeiture." If Lord *Ellenborough* had not given effect to the first clause, it would have been rendered of no effect at all; for it would have been restricted by the subsequent covenant, and the landlord must have waited three months, before he brought his ejectment. So here, the lessor would have been unable to do any thing under the special clause, if the general clause were to prevail. This point the Court below would hardly hear argued. The counsel for the Defendant there read the whole of the proviso, and then he came to the words, "or if any default shall be by them the said *Charles Smith* and *Henry Smith*, their executors, and so on." In order to maintain that this was consistent with the former part of the power, the counsel for the Defendant there cited the 5th rule in *Sheppard's Touchstone* (a), "that the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made, so as when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other. *Verba debent intelligi cum effectu. Et benigne faciendæ sunt interpretationes, ut res magis valeat quam pereat.*" The argument of the counsel for the Defendant was answered by *Bayley J.* "that (b) all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party, *verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissimè contra donatorem interpretanda est.*" This applies strongly to the case before the Court; for here is a concession made to the tenant. The rule is laid down in *Bacon's Abridgement* (c), that "grants are to be construed according to the intention of the parties, and if there appears any doubt or repugnancy in the words, such construction is to be made

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(a) P. 87. (b) *Ibid.* (c) *Bac. Abr. tit. Grant. F. p. 393.*

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as is most strong against the grantor." The second rule (a), "that if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary," on which so much reliance was placed by the Defendant's counsel, both in the Court below and here, was answered immediately by Bayley J. in the Court below, thus: "must not that reason appear upon the face of the instrument itself?" In support of their argument in the Court below, the counsel for the Defendant cited *Pugh v. The Duke of Leeds* (b) where in consequence of the rule *ut res magis valeat quam pereat*, the Court held that the word "from" may, in the vulgar sense, and even in the strictest propriety of language, mean either inclusive or exclusive; but that case gave very great dissatisfaction in *Westminster Hall*. *Roe, Dem. Goatly v. Paine*, only decided, that a lease might contain a general proviso of re-entry on a breach of covenant to repair, and also, a distinct covenant to repair after three months' notice. In *Horsefall v. Testar* (c), the question was, whether the words omitted were part of a covenant and the case was decided on a variance. The cases of *Hayes v. Stephenson* (d), and *Wood v. Day* (e), merely shew that covenants apparently inconsistent may stand to give the whole deed effect. The counsel for the Defendant in the Court below said, that the lessor might demand the rent on the day appointed, and if not paid might re-enter; and also, that he might re-enter on the 15th day after demand, if no sufficient distress were on the premises, and, that both clauses might stand together. Lord *Ellenborough* C. J. said, "there is an incompatibility between the first provision and the general provision, which would be restrained by the special

(a) *Sheppard's Touchst.* 33.

(d) 3 B. & P. 565.

(b) *Cowper*, 714.

(e) *Ante*, VII. 646. S. C.

(c) *Ante*, VII. 385. S. C. 1 *Moore*, 89. 1 *Moore*, 389.

provision." His Lordship afterwards said, " I think your rule that the special clause shall comprehend the general clause is the best certainly;" and again, " general words cannot control, where special words are used." In *Duppa v. Mayo* (a) it is said, " where there is a condition of re-entry reserved for non-payment of rent, several things are required by the common law to be previously done by the reversioner, to entitle him to re-enter; first, there must be a demand of the rent; secondly, the demand must be of the precise rent due, for if he demands a penny more or less it will be ill; thirdly, it must be made precisely upon the day when the rent is due and payable by the lease to save the forfeiture," as where the proviso is, " that if the rent shall be behind and unpaid by the space of 30 or any other number of days after the days of payment, it shall be lawful for the lessor to re-enter: a demand must be made on the 30th or other last day, *Co. Litt.* 202. a." not on the day when the rent is reserved, because this is an extension of the time, not for the payment of the money, but to prevent a forfeiture. If the proceeding is at common law, it must be founded upon the former part of the proviso, which gives a conditional power of re-entry, and the demand must be made on the 15th day, otherwise no effect at all would be given to that part of the proviso; for, if the demand is made on the first day, it is inconsistent, because the tenant is told he has 15 days: he is deluded and deceived into a forfeiture, if there can be a forfeiture under the second clause. The clauses may well stand together; but if the Court thinks that they cannot, and that the word reservation means rent, then the last clause will be rejected, and the first will be the only clause on which re-entry can be sustained. It is well known, that there are many leases where there is a conditional power of re-entry, and a general power of re-entry

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(a) 1 *Wm. Saunders*, 287. n. 16.

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at the last; but not one ever thought of bringing an ejectment on the latter clause. It is urged on behalf of the Defendant, that the object of the leases is the improvement of the estate; but that is not so: an estate is not very likely to be improved, by one, who lays out his capital in purchasing a leasehold interest in the shape of paying a fine. Here is a sale by tenant for life of his term, and he has no view to the improvement of the estate. The power, indeed, is not more strict against Lord *Vernon* than Lady *Vernon*: she was the owner of the estate, but she limited only a life-estate to her husband, and afterwards to herself, remainder to her children, remainder to herself in fee; still, it is a lease granted by tenant for life, and cannot have any validity as such, unless supported by the power. It has been said on the other side, that no inconvenience existed here, and that no additional proof would be required: but in *Rees v. King*, before cited, the lessor failed in his ejectment, because he had not proved, that he had searched every part of the premises for a distress. The case cited from *Comyn's Digest* has no application to this point, because in that case there was a search, and there was, in a locked up cupboard, property sufficient to cover the distress. *Care v. Day* is not to be distinguished from the present case. *Jones, Dem. Cooper, v. Verney* (a) is quite distinguishable from the present case: the question there was upon a power of granting building leases with proviso of re-entry: the lease was merely a lease of an old house with covenant to repair, and a proviso of re-entry for non-payment of the rent for 42 days: the Court decided on the broad point that this was not a building lease. In *Thompson v. Lady Lawley* (b), Lord *Eldon* C. J. says, speaking of *Rose v. Bartlett*, "I think it better to over-rule it altogether, which I must not do, than to deny to it its

(a) *Willis*, 169.

(b) 2 B. & P. 312. 318.

effect upon grounds which do not completely satisfy my mind as solid and safe grounds of distinction." The Court is undoubtedly called on to-day to reverse the decision of the Court of King's Bench pronounced only by two judges, and it is also called on to say whether *Coxe v. Day*, decided by four judges, and recognized in *Doe, on Demise of Vaughan, v. Meyler (a)*, be law or not.

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On this day the Judges delivered their judgment *seriatim*. *Richardson J.* who, while at the bar had been of counsel in the cause, expressed no opinion.

Garrow B. In this case, the question arises in consequence of a deed of settlement of the 2d day of *July*, in the year 1757, made upon the marriage of Mr. *Vernon* afterwards Lord *Vernon*, with Lady *Louisa Barbara*, his wife, and upon a power of leasing, which was granted by that settlement; and it is this, whether a lease, which was afterwards granted by Lord *Vernon*, whilst he was in possession of the estate, and entitled to it for his life, to the Defendant Mr. *Smith*, and another who is since dead, for their lives, is a good execution of the leasing power, or whether it is not in conformity to it: for, if not in conformity, to it, then the lease is void, and this judgment ought to be reversed; but, if it is a good execution of the leasing power,

then the judgment pronounced by the Court of King's Bench ought to be affirmed. The settlement provides for several estates, which were to pass, according to the limitations of the settlement, to those who should be entitled to them for life in succession; and it provides for different sorts of estates; for estates, which had been formerly let upon leases for years abso-

(a) 2 M. & S. 276.

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lute, and estates which were let for long terms of years, determinable upon lives; and it respects other property entirely out of the present question, namely the mining property belonging to this family: and it is observable, that, with respect to the leasing power, and the restrictions to be contained in leases to be executed under the power, the terms are different, as applicable to the two species of property to which I have referred. When there is a lease granted for a term of years absolute, whereon there is a rent reserved, which must be supposed to be equivalent to the value of the estate in the hands of the tenant, it is required, that all such leases shall contain a power to re-enter, in case the rent reserved shall be in arrear for the space of eight-and-twenty days after it shall become due. With respect to the property, whereof the land sought to be recovered in the present ejectment is a part, and which had been formerly demised for long terms of years determinable upon lives, it is provided, that in order to make it a good lease under the terms of the power, there shall be contained in the lease a power of re-entry for non-payment of rent: in this leasing power no time is specified, by way of indulgence to the tenant as to the payment of it, nor are any other terms required by the person, who from time to time shall be in possession of the estate, than that he shall insert in it a power to resume the possession of the estate for non-payment of rent. It has been strongly insisted before the Court, that we are to understand the object of the creator of the power to have been to take care of the interest of the reversioner. I agree to that argument, that it is one of the objects of the grantor to take care of the interest of the reversioner; but, in the mean time, it is equally his object to take care of the interest of the tenant for life, and to make the estate in the hands of the tenants,

whoever they should be, a beneficial estate; and to impose such terms as to the manner, in which it was to be holden under those, who from time to time should have power to grant it, as would be most beneficial to all parties. The lease granted by Lord *Vernon* to the Defendant and his deceased companion, contains a clause in it for re-entry, if the rent shall be in arrear for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy that rent; and the question is, whether this is a good execution of the power, or in other words, whether this is such a power of re-entry as was required by the creator of the settlement? It is observable that the creator of the power, as the expression is in a court of law, or according to the real fact, the adviser of the creator of the power, knew how to make distinctions as to the power of re-entry; and in the case where the rent reserved is of the most valuable description, there the creator of the power only requires of those, who shall come in succession into the possession of this estate as tenants for life, that they shall, for the preservation of this estate in its most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that if the valuable rent reserved on leases for years absolute, shall not be paid for twenty-eight days, then there shall be a right to enter at the expiration of those twenty-eight days. In the case of the render of two pounds a year and a couple of fat capons, or eighteen-pence at the option of the lessor, it is now insisted that the power of re-entry should be altogether absolute and unconditional; and that at the first moment, when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner, at that moment, to turn the person out, who, upon a valuable lease for years determinable upon lives, should

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have permitted the clock to make its round, before he had paid his sum of two pounds. If the donor had said it shall be a power to re-enter at the moment on which the rent is due and not paid or tendered, I admit the argument, which was strongly pressed upon the Court, we cannot alter it, we must execute the power; and if the creator of the power had inserted that special condition, I should not have thought that we could depart from it, and make another power: we are to see, whether, in fact, the power has been complied with or not. Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of rent. Is there not in the lease granted to the Defendant a power of re-entry on non-payment of rent? There is; but it is stated, and, I admit, with very considerable force, (for I by no means undervalue the strength of the arguments against the opinion to which I have found myself bound to come, and I respect the opinion and the great authority of those who, I know, differ from me,) that this is not such a compliance with the power as the reversioner has a right to expect that the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days; he has clogged it, too, with the necessity of seeing that there is no sufficient distress upon the premises. The answer to that is, (and we must look at this according to the experience, which mankind have upon such subjects,) that this event is not to be looked for in the common occurrences of life, and probably was not at all looked for by the creator of the settlement, that a rent of two pounds a year upon a valuable lease for life shall be either unpaid or not secured by a sufficient distress upon the premises, so as to make it an important condition against the interest of the reversioner, or against those entitled to the estate. Without, therefore, taking up more of the time

of the Court, it appears to me that this, being a clause of re-entry for the non-payment of rent giving to the person, to whom the rent is to be reserved, a power of re-entering, if fifteen days shall elapse without the payment, and if there shall be no means of satisfying him by distress upon the premises, is a satisfaction of the requisition, which requires only that there shall be a power of re-entry for the non-payment of rent. I, perhaps, should have done better if, concurring as I do in the judgment delivered by a great man, now no more, who delivered the opinion of the Court of King's Bench, I had read the judgment delivered by him on that occasion, but it might have appeared that I had not taken so much pains to make myself master of the case as I ought to have done. I have, probably, in delivering what I have said, weakened the effect of that, which fell from that high and great authority. My opinion is, that the judgment of the Court of King's Bench ought to be affirmed. I have omitted the second question, whether certain leases were properly admitted in evidence: if I am right in the opinion, that the leasing power has been complied with by there being a reasonable clause of re-entry, I think it follows, that the persons who, from time to time, were in possession of the estate, and were to make leases under the power, were well warranted in looking at the antecedent leases of similar property; and that, therefore, if they were at liberty to do so, it was properly submitted to the jury, whether the lease now in question were a good execution of the power in the settlement.

BURROUGH J. The question in this case arises on special verdict. We have to decide, whether a lease, made by a tenant for life under a settlement made in consideration of marriage, is valid or not. To render this lease valid, it must be shewn to be conformable to

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a power contained in this settlement. In order to give an intelligible opinion on this question, I find it is necessary to state the words of the power; because many observations arise on those words, which in my judgment, are decisive of the question. After the declaration of the uses of the settlement, the power is thus introduced: "Provided always, and it is hereby further declared and agreed by both the said parties to these presents, that it shall and may be lawful to and for the said *George Venables Vernon* the younger, and *Louisa Barbara Mansel* his intended wife, from time to time during their respective lives, when and as they shall respectively be in possession of, or intitled to the perception of the rents and profits of the manor, messuages, &c. &c., so limited to them for their respective lives as aforesaid, by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant, such part or parts of the said manor, messuages, &c. &c., or parts or shares thereof, whereof they shall be in possession, or intitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years, determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives." Then follow the restrictive clauses; amongst which are the following: "So as, in every such lease for a life or lives, &c. there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, the ancient and accustomed yearly rents, duties, &c. or more, or as great or beneficial rents, duties, &c. as now are, or, at the time of demising, were reserved;" and then follows the clause, on which the question in the cause mainly depends: "And so as there be contained in every such lease

lease a power of re-entry, for non-payment of the rent, thereby to be reserved." Then follow other restrictions, which need not be noticed. Immediately following this power, is another power, which it is necessary to advert to particularly; the former power relates only to lands then let for lives, or years determinable on lives. The second power runs thus: "And also, by indenture, &c. to demise all or any of the said manor, messuages, &c. for any term or number of years absolute, not exceeding 21 years in possession, &c.; so as, upon every such lease, there be reserved as much, or as great and beneficial yearly and other rents as now are paid, or the best and most improved yearly rent, &c. without taking any fine, &c." This power concludes with this further restriction: "And, so as, in every such lease for any term of years absolute respectively, there be contained a clause of re-entry; in case the rent or rents, thereupon to be reserved, be behind or unpaid, by the space of 28 days after the time thereby respectively appointed for payment thereof." Then the special verdict finds Mr. *Vernon* to be tenant for life, that the premises in question had been let for years, determinable on lives; and that he, on the 5th of *September*, 1803, made the lease in question, which is stated, and appears to contain a proviso, or *power of re-entry*. "If it shall happen that the rent of 2*l.*, and every or any of the duties, services, &c. shall be behind or unpaid, in part, or in all, by the space of 15 days next over or after the times whereat or wherein the same ought to be paid, &c.; and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof (if any be) may be fully raised, levied, and paid." This lease closes with a general clause, that if any default shall be made in the payment or performance of all or any of the reservations, covenants, or agree-

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ments before contained, it shall be lawful for the lessors, their heirs, or assigns, to re-enter. The special verdict then finds the rent, duties, reservations, and payments to be ancient and accustomed; that the lands and tenements in the lease and declaration mentioned are the same; and then it finds, that the usual and accustomed form of leases of the estate contained in the said marriage settlement for lives, or years determinable on lives as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the said indenture of lease. This is the substance of the special verdict. I have stated as much of it as appears to me to affect the present litigation. The first question is, whether this finding of the jury, as to the insertion of the conditional proviso of re-entry in prior and subsequent leases, can be made the means of construing the power contained in this settlement? I am of opinion, that it cannot. Many parts of these powers refer to a pre-existing state of the property; for instance, the first power authorises leases of lands then let, and it requires the reservation of ancient and accustomed rents, &c. The second power requires the reservation of as great and beneficial rents, &c. as were then paid, or the best improved rent. I mention these matters, for the purpose of contrasting them with the clause, on which the question immediately turns. There are cases wherein evidence of former leases and parol evidence must of necessity be received; because the parties to the deed refer to matters of fact, and make them part of the transaction; and the matters found by the jury would be fit for our consideration, if there were a word in the clause in question, which admits of a reference to the leases prior or subsequent to the settlement. The words of the clause are: "And so as there be contained, in every such lease, a power of re-entry for non-payment

payment of the rent thereby to be reserved." Neither does the clause itself, taking it in the substance, nor does any word of it, by itself, import a reference to any prior state of the property. I am of opinion, therefore, that this evidence cannot be used in the construction of this power. This brings me to the construction of the power itself. The question is, whether the power authorises the terms of re-entry, contained in the lease of the 5th *September*, 1803, which are, "if it shall happen that the rent, &c. shall be behind, or unpaid by the space of 15 days, and no sufficient distress or distresses can or may be had and taken upon the said premises." I am of opinion, that these restrictions are not authorised by the power. First, because the words of the power have, in my apprehension, a plain and specific meaning. A clause of re-entry, if the rent shall be behind, is a perfect idea, wanting no explanation, and it is a very different thing from a clause of re-entry, if the rent shall be behind 15 days; and the difference is still greater if you shall superadd, "and in case no sufficient distress can be had on the premises." It must be remembered, that this is a power for a lease to be granted by a tenant for life, without which he could make no lease which would not expire with his death. It is a power contained in a deed: it is quite a new thing, under such circumstances, to extend the construction of such a power beyond its meaning, to be collected from the face of the deed. If any lawyer's attention had been drawn to these words, before the lease was granted, I am persuaded he would not have signed his approbation of a draft of a lease in the terms, in which this is framed. On these occasions men, after the thing is done, are apt to look at the lease, and advert to the consequences of holding it to be bad; and to treat the authority, under which it is granted, more lightly than they ought to do.

Secondly,

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Secondly, it is suggested, that this clause in the lease must mean, that the power of re-entry must be a reasonable one: but who is to judge of that; the parties to the deed, or the Court, or the jury? If the Court or jury are to judge, what definite rule is there to be given on the subject? This is to introduce a difficulty, which I I know not how to combat. I am of opinion, at all events, that such an idea cannot be admitted to govern our construction, if it varies the construction of the parties' meaning, to be collected from the words of the deed itself. Thirdly, the words and meaning of the parties in the deed, I hold, to be binding on me: I cannot read this deed without a conviction, that the parties meant a pure and simple clause of re-entry. The second power enables the successive tenants for life to make leases for a term of years not exceeding 21 years, for which the parties provide, that there shall be a clause of re-entry for non-payment of rent, if the same shall be behind or unpaid by the space of 28 days, after the times thereby appointed for payment. This affords to me an irresistible argument in favour of the generality of the former power. The parties have used general terms in the formation of the first power, and special terms in the formation of the second. The lease in question cannot be maintained, unless we add, that the lessor had a right to bind the inheritance with both these restrictions: First, that no one shall enter, unless the rent shall be behind 15 days. Secondly, nor if sufficient distress can or may be had or gotten on the premises. I consider these restrictions as contrary to the meaning of the power, not in conformity with it, and prejudicial to the inheritance. As to the clause of distress, it appears to me, that the case of *Coxe v. Day* is precisely in point; and I agree with the learned Judges, who
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signed the certificate in that case. That such a clause is attended with the greatest inconveniences to the remainder-man, we have the authority of the Court in *Coxe v. Day*, and we have it practically exhibited in the case of *Rees, Dem. Powell, v. King and Morris, Forester*, 19. This was very ably argued at the bar, and a great number of cases were cited; but the two cases I have alluded to, and the plain intention of the parties expressed in the deed, govern my judgment. I have only to add a word with respect to the general clause of re-entry, towards the end of the lease. It was observed at the bar, that the word "rents" is omitted in it: if the clause does not extend to rents; then it has no bearing on the subject. I think it cannot be intended, that the parties meant it should have application to a case which was before fully provided for, and which the powers required to be expressly provided for, and therefore, I think, the word rents was designedly omitted. This clause was adverted to in the Court below, and it appears not to have been thought worthy of much notice. I have considered this case, with an anxious wish to find myself justified in concurring in affirming the judgment, but, finding I cannot do this without sacrificing the opinion I have formed on great attention to the subject, I am obliged to pronounce my opinion to be, that the judgment must be reversed.

PARK. J. This record having been so fully stated by my learned brothers, it is not necessary that I should take up the time of the Court in restating it, being about to give my opinion, that the judgment of the Court of King's Bench ought to be reversed. I own I do so with great diffidence in my own judgment; but, thinking, as I do, upon the point, it is my duty, notwithstanding the great learning and ability, which I have to oppose in those who pronounced that judgment, as well

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well as those, from whom I have the misfortune to differ upon the present occasion, to declare my real opinion; and my only consolation is, that, in so deciding, I do not stand alone, but have equal learning and ability to support me. This case has been argued very elaborately, with very considerable talent, and at great length; but, notwithstanding the length of the argument, the question is a very short one, and requires, I conceive, no very extensive discussion; for it is only this: Is the lease of the 5th *September* conformable to the power contained in the deed of *July, 1757*? Let us see what the power is, and what the restriction. The words are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." These are the only words material to our present enquiry, and they seem to present no difficulty; for, if a plain man were asked how he would execute such a power, he would say, insert a clause, that, if the rent be not paid as reserved, the lessor shall have power to re-enter. How much, then, must he be surprised to find two conditions, which he will in vain look for in the power, but which materially alter the rights of the remainder-man: "Provided, that if at any time during the estate hereby granted the said yearly rent or sum of two pounds, or any of the duties, services, reservations, and payments hereby reserved shall be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times, whereat or whereupon the same ought to be paid, done, or performed; and no sufficient distress or distresses can or may be had or taken upon the said premises whereby the same, &c. may be fully paid;" (and then come several other clauses not material to our present enquiry;) "then, and from thenceforth, in all, or any, or either of the said cases, it shall and may be lawful to and for the said *George Lord Vernon*, his heirs and assigns,

assigns, and the person or persons, to whom the freehold or inheritance of the premises shall as aforesaid belong, unto and upon the said premises hereby demanded, and every part and parcel thereof wholly to re-enter." I admit, that, in construing *powers*, the intention of the creator of the power is to be attended to, as it is to be collected from the instrument, and therefore, perhaps, it is not correct to say that powers are to be construed strictly, according to the intention of him who gave the power; but there is no ground for leaning either to the tenant for life or the remainder-man, *Goodtitle v. Fumman* (a), and *Pomery v. Partington*. (b) For a power to make leases is given and intended to operate beneficially for both parties; that he, who had only an estate for life might grant something like a permanent interest, to induce the farmer to cultivate and improve the ground, by which the tenant for life and the remainder-man is equally benefited; the one, by enjoying during his life a well-cultivated estate, and the remainder-man, by not coming to an impoverished one. But still the execution of the power must be such by the tenant for life, that the remainder-man is not prejudiced in point of remedy for his rent, nor any other circumstances which the maker of the power intended he should enjoy. Can any one, in reading this lease, and comparing it with the power, say that it is at all conformable to it, and is not the remainder-man placed in a situation less beneficial and advantageous than the maker of the power intended? To say the contrary will be to argue, that a clause limited and clogged with conditions is as beneficial as one unlimited and unclogged. If this case turned entirely upon that part of the clause, which does not enable the party to re-renter unless the rent has been in arrear fifteen days, the power having no such clog; as at

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(a) *Doug.* 565.(b) 3 *T. R.* 674.

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present advised, this would, in my opinion, be sufficient to avoid the lease. It is said this is nothing more than a reasonable time; but if fifteen days be reasonable, why may it not be as fitly contended that twenty, thirty, or forty are a reasonable time, as that fifteen are? The maker of this power never contemplated it in this case, nay she contemplated the contrary; for whenever she meant to give time, she has said it expressly, and therefore well knew, that if she intended it, it was necessary to express it; for immediately after this clause, she enables the making of leases of other parts of the property, and expressly gives the power of re-entry for non-payment of rent only, *if it be unpaid for twenty-eight days*; and therefore, nothing, in my mind, can be a stronger argument in this case against the validity of this lease than this very circumstance; for the permitting it to be done in the one case amounts to a clear prohibition in the other case of entry. But it is not necessary to insist upon this, because it is quite clear, that if the power be badly executed in one respect, the lease is altogether void; and upon the second point of objection, with all the deference I most unfeignedly feel for the very learned judges who have differed, and those who now differ from me, I have never been able to entertain a doubt. The words are, "so as no sufficient distress or distresses can or may be had or taken upon the premises." Is this no clog or impediment to the right of the remainderman? Is it no injury to him in the enjoyment of his estate, that he cannot enter for the condition broken, till he has searched every corner of his estate for a sufficient distress? This condition, then, is a serious restraint unauthorized by the power. There is no doubt, that what I have just stated is so, and has been so decided by the whole Court of Exchequer, confirming, by that decision, the opinion of a most learned judge,

judge, (Mr. Justice *Heath*), and upon this principle, that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and in case of a distress being made, every part of the premises must be searched, *Rees, on Dem. of Powell, v. King (a)*, tried before *Heath J.* at *Hereford*, 1793. The summary of the case is this, that a clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and, that every part of the premises must be searched, before it can be concluded, that there is no sufficient distress. The learned judge nonsuited the Plaintiff in that case; and after very mature argument the Court held, that as to the forfeiture of the lease, the rule of convenience, in cases like this, is, that a party making a distress must look into every part of the premises; else how can he say there was no sufficient distress? But this very point has been expressly decided in the case of *Cose v. Day (b)*, where, under a leasing power, a condition for re-entry for non-payment of rent in twenty days, in case no sufficient distress can be taken on the premises, whereby to levy the rent, was held not to be a good execution of the power; such conditional power of re-entry being less beneficial to the remainderman, than an absolute power of re-entry for non-payment of rent. In the course of that argument, (for it was a case where the Judges were to certify their opinions to the Court of Chancery,) Lord *Ellenborough* said, "There can be no doubt, that it is more beneficial to the owner of the estate to have a power of re-entry at once upon the tenant, upon non-payment of the rent within a certain time, than to have such a power only in case there shall be no sufficient distress upon the premises, from time to time, as the rent shall fall in arrear;" and in another place his Lordship said, "In

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the one case, the rent is secured from time to time by successive suits, with the risk of sureties if the distress be replevied, in the other, it is secured *once for all* by the landlord's re-possessing himself of the land out of which the rent is derived." In another place, his Lordship said, "surely the direct power of re-entry is more beneficial to the landlord;" and again, the act of 4 Geo. 2. ch. 28. having been quoted by the present Lord Chief Justice *Abbott*, Lord *Ellenborough* said, "the very provision of the legislature shews that there is a difference in this respect;" and the Judges afterwards certified their opinion, that the lease was not made in conformity to the power, and was therefore void. On these grounds, therefore, I think the lease in question cannot be supported. But, it has been said at the bar, that a general clause of re-entry, which is to be found in the lease, will controul the special clause. To that doctrine I cannot agree, because, if I do, I must overturn all the doctrine from the time of Lord *Coke* to the present day. In *Shepherd's Touch*. 85. s. 1., it is said, "If there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary." In *Hardres*, 94. *Cotter v. Merrick*, Baron *Nicholas* says, "When there are two clauses in a deed, of which the latter is contrary to the former, there the former shall stand." In *Thomas v. Howell*, 4 *Mod.* 69., "in deeds it is admitted (say the Court) that clauses which are general shall be governed by precedent clauses which are more particular." And again, in *Altham's case*, 8 *Co.* 154. b., *Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa*. Subsequent words may qualify and abridge, but not destroy. And indeed, in this case, the learned counsel, who last argued in favour of the general clause, was obliged to admit that Lord *Ellenborough* inti-

intimated a strong opinion against the validity of his argument in this respect. I am, therefore, also of opinion, that this point will not support the lease, for this general clause would completely nullify the special power of re-entry. The other point in this case was, whether the former leases were admissible to explain this? In answer to which, I say that this deed has nothing ambiguous in it. It is clear and precise: every man who reads it with a legal mind can give it a clear and satisfactory solution. This power and lease contain no reference to former leases, or their terms, and, if it had, the Master of the Rolls in *Baynham v. Guy's Hospital* (a), says, "I strongly protest against the argument used by the Judges in *Cooke v. Booth*, *Comp.* 819., as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it;" and in a subsequent case the same learned person says, (3 Ves. 694.) "A legal instrument is not to be construed by the acts of the parties." The same doctrine in this Court of Exchequer Chamber was maintained in the case of *Iggulden v. May*, 2 *New Rep.* 449. But this very point was, in effect, decided in *Doe, d. Allen, v. Calvert*, 2 *East*, 376., in which I was counsel. It was there held, that, as the lease did not conform to the power, it was void; although such lease were according to the custom of the country; and the same had been before granted by the person creating the power. It is true, no question was there raised as to the evidence being admissible, but if, when admitted, the Court would give no effect to it, it ought not to have been admitted. But, without adverting to cases, I am of opinion that no evidence can be admitted to explain a deed, which is plain and perspicuous in its terms, and contains no ambiguity. Upon the whole, I am of

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opinion, that the judgment of the King's Bench ought to be reversed.

WOOD B. The question, in this case, arises on a lease, which was executed under a power contained in *Lord Vernon's* marriage-settlement; and the question is, whether this lease is warranted by the power of leasing contained in that settlement; if not, the lessors of the Plaintiff will be entitled to recover, but if it is warranted by that power, then they are not entitled to recover, and the judgment of the Court of King's Bench must be affirmed. There are three distinct powers of leasing contained in this marriage-settlement, applicable to three different modes of letting, and in which different modes of letting are prescribed. The first power to lease refers to lands leased for lives or years determinable on lives, to any person or persons in possession or reversion; and one of the conditions of such letting is in these words: "And so as there be contained in every such lease a power of re-entry, for the non-payment of the rent thereby to be reserved." The second power of re-entry applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at a beneficial yearly rent, such as was then paid, or the most improved rent without fine or foregift; and there it is provided "that there be a clause of re-entry, in case the rent or rents, thereupon to be reserved, be behind or unpaid, by the space of twenty-eight days, after the times appointed for payment." There is also a third power to lease lands for mining, and in that, no power of re-entry is reserved at all. The lease in question is made under the first power, which provides for a re-entry for non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. These are the powers. The proviso in the

lease in question runs thus, that if the yearly rent of two pounds, or any of the duties, services, reservations, and payments thereby reserved, shall be behind, unpaid, or undone, in part, or in all, by the space of fifteen days, after any of the times of payment or performance, "and no sufficient distress or distresses can be had, or taken, whereby the same, and arrearages, may be raised;" engrafting upon this power the terms contained in the statute of 4 Geo. 2. c. 28. It is contended, on the part of the Plaintiff, that this proviso of re-entry in the lease is not such a one as is required by the settlement; and for two reasons, inasmuch as there is a time limited for re-entry in this lease, whereas the settlement is narrower, and gives no time; and, inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention. The clause, upon which this lease is founded, requires no more than a power of re-entry for non-payment of rent, giving it no modification, or qualification at all; and there is in the lease a clause of re-entry, so that in terms the lease complies with the settlement. But though the power is general, I admit that it must not be executed in an illusory manner, but it must be executed in a reasonable manner, and in such a manner as the law will deem reasonable: for I conceive that the law will judge of the operation of a power, as well as it will judge what is a reasonable execution of it, where no specific terms are appointed. In the clause of re-entry for the rack-rents, a time is limited, that is to say, eight-and-twenty days, that I admit cannot be departed from. Why was no time limited in this power? Because the settlement meant to leave it, as I conceive it, to the discretion of the tenant for life, to insert such a reasonable power of re-entry as might secure the rent to the reversioner;

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for, where no precise terms are limited, the inference of law is, that it must be executed in a reasonable manner, and the law will take notice what is a reasonable manner. The law will take notice, whether it is executed in an illusory manner or not; as, for instance, where a party gives to a person the power to appoint portions to his children, as he shall think proper, if he shall in substance give all to one child, that will be an illusory manner of executing the will of the donor; and the law will not permit such an execution of it. The object of a clause of re-entry is, merely, to secure the rent, and it has always been so considered at law, and in equity; and when I see that object is secured reasonably and fairly, and when we are not tied down by any specific terms, I am not to look out for what I conceive in this case to be a mere *apex juris*, to defeat the intention of the parties. I think we ought to construe deeds and acts *ut res magis valeat quam pereat*; and one case was cited on the part of the lessor of the Plaintiff, in which the right and true principle, on which these powers are to be construed is, I think, well laid down. That was the case of *Cotter v. Merrick* (a), which has also been referred to by my Brother *Park*; and it was particularly mentioned and referred to by Mr. *Jervis* in his argument. There the question arose upon a special verdict; and the question was, whether a lease, which had been executed by tenant in tail, was conformable to the powers which were granted for making leases by tenants in tail, by the statute of *Henry 8.*: on a special verdict, it was found that *Robert Earl of Essex* was seised in tail to him and the heirs male of the body of his grandfather, of the manor of *Pembroke*, and that he died seised; that his son entered, and made a lease by deed for twenty-one years to Sir *John Merrick*, rendering rent to the

(a) *Hardr. 89.*

lessor; the special verdict also assumed the son's death, and found that after his death the estate tail descended to one who was not heir at law to the lessor; and the question was, whether this was a good lease within the statute of 32 *H. 8. c. 28*. That statute has provided that, if a tenant in tail makes a lease of an estate tail, and if, "upon every such lease, there be reserved yearly, during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the death of the lessors, if no such lease had been thereof made, and to whom the reversion shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomedly yeelden or paid." Now in this case, the estate tail descended to a different person, who was not the heir at law; and the rent, in this case, was reserved to his "heirs and assigns," so that there was not a rent reserved in terms to the persons who were to succeed to the estate after the death of the lessor; but it was reserved to the heir of the lessor, which certainly was departing from the power contained in the act of parliament. In that case Baron *Hill* says, "And in the exposition of statutes, the judges must make such a construction as to advance, and not to frustrate the intention of the makers." So, I say, in cases of settlement. In cases of powers reserved by settlement, we ought to do the same, "if by any reasonable construction of law it can be so." Baron *Parker* also says, "It is the office of a judge to preserve, and not to destroy, an estate." These, I conceive, are the true principles upon which we should look at all these acts. In the last-mentioned case, the judges gave that operation to the power, which, in all probability, corresponded with the intention of the parties, although, in words, it was contrary to the proviso contained in that act of

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parliament. Then there are two points as to time; for I consider that the settlement has left it in the power of the lessor to insert a reasonable proviso for re-entry, and has not tied him down in this case, as it has in the other, to twenty-eight days. I consider that the true operation and effect of it is to leave it to the discretion of the lessor to insert a reasonable power. Then, is this a reasonable power in point of time? The period is fifteen days. In the other clause the period prescribed by the donor is eight-and-twenty days, which is almost double the time; then, surely, fifteen days must be considered a reasonable time. I lay no great stress on the finding of the jury, although I think it is not entirely to be laid out of the question, because it is found by the jury that other leases have been executed, and that such is the usual time. I think that is a fair criterion, from which we may judge of the reasonableness of the provision. In *Littleton*, it will be seen, from the instances which he puts, what he considers a reasonable time: he says, "If it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year." (a) I only make use of this to shew that at the time when the above was written these provisos were considered to be reasonable. Then, supposing this to be reasonable in point of time, the last objection, and that mostly, if not entirely relied on, was, that the right of re-entry was clogged with the condition of there being no sufficient distress upon the premises: is that, then, a reasonable condition to be inserted? With reference to the law, as it then stood, I conceive it was clearly reasonable: the statute of 4 *Geo. 2.* has considered it to be reasonable, that the lessors, where they had a power of obtaining the rent, should not enter, if there was a sufficient distress; and where is

(a) *Co. Litt. s. 325. 201. a.*

the difficulty? Here is a rent of 40s.: the lessor might have an action for it, immediately when it became due, or there might be a distress. Can it be supposed that there would be any difficulty in finding a distress for 40s. upon an estate, they might take a sheep, or a horse, or go into the house, and there they would find a table, or chairs, or some articles answering to that value: it is mere fancy to suppose, that there would be any difficulty in finding a distress. Now I take the liberty of adverting to the statute of 4 Geo. 2., on which I wish that there had been a little more argument and consideration, as well in the case of *Case v. Day*, as in the case before us: the date of this deed of settlement was in the year 1757, which was after the passing of the statute of the 4 Geo. 2.; for that was passed in the year 1731, and regulates the powers of re-entry for non-payment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety: there must have been a demand of the rent upon the land: if the subject leased were a house, the rent must have been demanded at the fore door, and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so that the money might be numbered. After the lessor had done that, the law required him to make an actual entry, and bring an ejectment; and if all these things were not critically and exactly performed, the lessor lost the right of re-entry for that time, and was obliged to wait till other rent accrued, and then make a fresh demand and re-entry for the subsequent rent. This laid a landlord under great difficulty, and, therefore, it was thought right to remedy that inconvenience; but at the same time that the legislature did remedy that inconvenience, it meant also to provide for the security of the tenant; and, therefore, it is said, that the landlord, in such a case, shall not

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avail himself of his power of re-entry, which is merely for the purpose of securing the rent, if he can be paid by distress upon the premises. This was thought reasonable by the legislature; and if it was thought reasonable by the legislature, why should it not be thought reasonable by individuals, when they are making a settlement applicable to the subject? It appears to me that there can be no better test of the reason of the thing, than by seeing what the legislature has done in similar cases. That a power of re-entry is merely for securing the rent, has always been considered; and in *Wadman v. Calcraft* (a), there was a forfeiture by the non-payment of rent, and a forfeiture likewise by the breach of several covenants. The Master of the Rolls there made these observations: "The Plaintiff seeks to be relieved against a forfeiture of the lease, which he states to have been incurred solely by the non-payment of rent;" this is what the Plaintiff says; "and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture, considering the purpose of the clause of re-entry" (it is for this passage that I cite it) "to be only to secure the payment of rent, and that when the rent is paid the end is obtained, and therefore the landlord shall not be permitted to take advantage of the forfeiture." And even before the statute of Geo. 2. it was the same. What then is the alteration which is made by the statute? It has dispensed with the formalities attending re-entries at the common law, and has said, that where a landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment, and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due: these are

(a) 10 Ves. 68.

the terms engrafted into this settlement. The tenant may pay or tender the rent and costs to the landlord or his attorney, or he may pay it into Court before trial, and all the proceedings shall cease. The policy of this law is to prevent forfeiture for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it; and at the same time the legislature have thought it right to impose the condition, that there shall be no ejectment, if there be a sufficient distress to secure the rent. In this case, the landlord has security enough for his rent, because he may bring his action the moment it becomes due; he may distrain the moment it becomes due; and, after the expiration of fifteen days, if there be no sufficient distress, then his right of re-entry attaches. I make use of this statute, therefore, to shew the reasonableness of engrafting such a power into the settlement. But it does not seem clear to me, that the statute does not shut the door against any proceeding by re-entry at the common law, and, if this case should hereafter come before parliament, I hope that point will be a little more considered. If the statute does shut the door against the proceeding of re-entry as directed by the common law then *cadit questio*, because then the penners of the lease will have introduced more than the law has introduced; and, without doubt, the penners of the lease did conceive, at that time, that it was incumbent upon them to make the same kind of provisions as the statute had made. I will a little consider that question, whether the door of re-entry is not entirely shut by the statute. That statute begins by reciting, that "great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties which attend re-entries at common law, and forasmuch as when a legal re-entry is made, the landlord or lessor must be

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at the expense, charge, and delay of recovering in ejectment, before he can obtain the actual possession of the demised premises; and it often happens, that, after such a re-entry made, the lessee or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord by an injunction for recovering the possession, but, likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur: for remedy whereof, be it enacted by the authority aforesaid, that in all cases between landlord and tenant," (and I lay some stress upon this expression,) "in all cases between landlord and tenant, from and after the 24th day of *June*, 1731, as often as it shall happen that one half year's rent shall be in arrear" (here the rent is reserved half-yearly,) "and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord and lessor shall and may," (so that here *is* the word "shall," not merely "may," but, if it was the word *may*, I should have thought that it was imperative, in analogy to another statute which I will name; but here it is) "shall or may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises in the usual way, and that shall be equivalent to the formalities of a re-entry." Here it is imperative, as it appears to me that he shall not proceed as at common law: the statute dispenses with that proceeding, and abrogates it, and directs, that he shall proceed in the usual manner by ejectment. The act then continues, "And in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, in case it shall be made appear to the Court, where the said suit is depending, by affidavit, or be proved upon the trial, in case the Defendant appears,

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appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, then, and in every such case, the lessor or lessors in ejectment shall recover judgment:" but the lessor cannot re-enter in this case, unless there be an insufficiency of distress, so that here it is imposed upon him, that he shall not avail himself of the power of re-entry, if there be sufficient distress; then, the statute also provides that the tenant shall be at liberty to pay his rent into Court, and so on, thereby giving an advantage to the tenant. Now, in this case, it is contended, that the power of re-entry at common law is not taken away. Why should it be left? It is quite nonsense to suppose that it can be left for any thing but as a security for the payment of the rent, because, if the lessor should make a re-entry at the common law, while he might find goods to distrain, the present Defendant might file a bill in equity to restrain him. Neither law nor equity will permit the lessor, since the stat. of 4 Geo. 2., to take any proceedings for any other purpose save the security of the rent; and, it appears to me, that is the reasonable and fair and proper construction of the statute; for where would be the use of leaving a loophole for the landlord to make an entry at common law, in order to avoid this statute? The intention of the act is, that the lessor should have the same relief in a Court of law, as he before had in a Court of equity: it provides for the payment of rent into Court, and so on. It strikes me, that it is imperative upon the party to proceed in the way, which shall enable him to avail himself of this act, and it always has been so considered; for, I dare say, there will not be found, since this statute, a re-entry at common law: I never heard of an instance

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instance of it, nor read of an instance of it; and what makes me think it is imperative is the statute of 8 & 9 *Will. 3.*, "An act for the better preventing frivolous and vexatious suits:" that statute runs in these terms, "And be it enacted (a), That in all actions, which, from and after the 25th day of *March*, 1697, shall be commenced or prosecuted, in any of his Majesty's courts of record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements, in any deed, indenture, or writing contained, the Plaintiff or Plaintiffs may," (not "shall and may," as it is in the 4 *G. 2.* :) "the Plaintiff or Plaintiffs may assign as many breaches as he and they shall think fit, and the jury, upon the trial of such action;" (then come the words,) "shall and may assess, not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches, so to be assigned, as the Plaintiff upon the trial of the issues shall prove to be broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done on such like actions." It is provided, in case of judgment on demurrer, that the Plaintiff may suggest (always using "may") "as many breaches of the covenants and agreements as he shall think fit;" giving the Defendant the opportunity of paying money into Court after such judgment is entered, and before the execution is executed. I remember the first case, almost, where the statute was brought into consideration, and that was the case of *Drage v. Brand* (b), for, till that time, it had been always considered to be in the option of the Plaintiff, whether he would proceed according to the course of the common law, or according to this statute; and therefore, in general, he assigned only one breach; and in *Drage v. Brand* that came to be considered, and there it was contended that the Plain-

(a) *C. 11. s. 8.*

(b) 2 *Wils.* 377.

tiff had a right to proceed at the common law, and not upon this statute; and it was argued very much upon this, that the statute says he *MAY* assign, and that therefore it was left at his discretion, whether he would proceed upon the statute, or according to the course of the common law; however, the construction upon that statute in that case, and which has been followed in all the courts of common law, is, that the statute has been considered as compulsory, and that such is the fair and liberal, and proper construction to be put upon it: for, where would be the use of suffering a man to recover his penalty, and then to oblige the Defendant to go into a court of equity, where an issue would be directed? To prevent that circuitry, the language of the statute virtually is, they "shall" assign breaches, and so on; so here, I say, in analogy to this statute, the true and real construction, in my humble opinion, is that by the statute of 4 G. 2. the power of re-entry at common law is abolished, and the lessor must proceed in the usual way, by serving an ejectment at the end of half a year, and cannot proceed in any other way. If I am right in the construction of that statute, there is an end of this question; for the penners of this lease have inserted nothing in it which is not conformable to this statute. But I will suppose it to be left open to the landlord to proceed in the old way, as he might have done before the statute, and that a reasonable clause of re-entry is all that the power required: can the adoption of the same condition, which the legislature has adopted in similar cases, not be considered as a reasonable power? The case of *Coxe v. Day* has been cited, and it has been cited as an authority of the Court of King's Bench, that the inserting in a condition of re-entry, in a lease made under a power, the words "in case no sufficient distress can be taken upon the premises;" these words not being in the power, was not a good execution of the power.

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power. I must own, I should have doubted very much the propriety of that decision, and I wish much, that the operation and effect of the statute 4 G. 2. c. 28., had been brought more fully under the consideration of the Court; but, be that case as it may, it is different in one material feature from the present case. The re-entry required there was, for the non-payment of the rent reserved by the space of twenty-one days: the Court considered that as a precise specification, that the settlement had prescribed a particular form of re-entry, and therefore it might, perhaps, be inferred that no other qualification would be warranted; but, here, there is no time limited: a power of re-entry in general is all which is required, and therefore, I should say, that a reasonable qualification was meant. But, it is plain, that the Court of King's Bench considered this case as contradistinguishable from the case of *Coxe v. Day*; for it cannot be supposed that they had forgotten their own decision, which was made only a few years before, at the time when they made the decision of this case, because there was the same Chief Justice in the case of *Coxe v. Day* that there was in the latter case, and one of the same learned Judges (namely, Mr. Justice Bayley). They must have considered this case as distinguishable from that of *Coxe v. Day*; for, that very same Court decided, that this power had been reasonably and properly executed, and therefore they must have considered the former decision as wrong, or, that this case was distinguishable from it. They gave judgment for the Defendant; and I am of opinion that judgment was rightly and properly given, and that it ought to be affirmed.

GRAHAM B. This question springs out of a settlement made in 1757, by which Lady *Vernon*, then having the disposal and control over this estate, has applied different leasing powers to three different descriptions

tions of property. Of the first description are those lands, which have usually been letten for lives, and such are the lands, which form the subject of the lease in question. Of the second description are the lands which were leased for years at rack-rent. The third comprises mines. The donor of the power makes a distinction between the leases of mines, and leases of property of the two other descriptions: she considered, that, in directing that the leases of mines should contain all covenants usual in leases of that species of property, she sufficiently guarded the estate of the remainder-man, although she omitted to require the lessor to insert any power of re-entry on non-payment of rent. She makes a different and more explicit provision for enforcing the payment of rent upon the leases of lands let for years at rack-rent, whereon the rent reserved constitutes the principal value and profits of the land; and for securing which it is natural that she should more anxiously provide; while on the other hand she expresses more indifference with respect to the yearly rents reserved on that species of property, whereof the fines, which are a species of anticipated rent, constitute the substantial enjoyment and income; and the reserved rent is merely a recognition of the relation of landlord and tenant: for, as to any beneficial enjoyment, a rent of two pounds may be treated in the present discussion as a rent of two shillings. And; with respect to the property of this description, she has varied her expression, manifesting less anxiety for securing the payment of the lesser rent, and only requiring a power of re-entry in general terms. Her expression is so general, that, of itself, it means nothing definite: it necessarily refers to something extrinsic. I see not how it was to be executed, without reference to extrinsic facts, something that had theretofore been done with the property, or to extrinsic

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extrinsic judgment or opinion. A circumstance is found here which I mention, though I do not rest my judgment on it; but it is material for consideration, that at the time of making this settlement, and so long as to the year 1803, the then subsisting leases contained the terms of proviso which is contained in this lease. What, in the name of common sense, was to be done by any person who was to pen a lease, and reduce into practice this general power? For all that this lady has said, is that there is to be a power. Something then is to be done that is reasonable and proper. What is to be done? Am I so to bind down the tenant, that upon his failure to pay his rent before the last moment of the day on which it is reserved, the landlord may re-enter? Those are such terms, that any man taking a lease would revolt at them. For that must drive him to the difficulty of applying to a court of equity for relief; for it would be a re-entry at common law; and that some time must be given, is admitted by all parties. What time? who is to judge of the reasonableness (for this is a difficulty which has struck very intelligent minds)? Is it to be the judge or a jury? Neither. It must be the person who is to execute the power. It is he who necessarily is to embody in a specific shape that which the creator of the power has required, a power of re-entry, and the Court is ultimately to determine whether he has followed the intention of the donor. I do not say that every re-entry will satisfy the power; but it must be a re-entry, either pursuant to that which had been done in the earlier enjoyment of the property, or at least commensurate with the occasion. It is material, that when this settlement was made the statute 4 Geo. 2. had passed, and both the law and the equity were the same as they now are. Those who were to execute the power had then the statute for a guide. I state it as a clear proposition, established by my long experience
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in courts of equity, in the hearing of those who can correct me if I am wrong, that, whatever be the form of these clauses, whether they express that the lessor may re-enter or that the lease shall be void, or whatever other form they pursue, a court of equity would, if the lessor re-entered, enjoin him, on the lessee's payment of rent and costs, to proceed no further at law. But it was felt hard to put a tenant to so great an expence of coming to a court of equity, in order to retrieve the non-payment of a mere nominal rent, as two-pence, for such I may assume this to be; and they also felt the hardships under which the lessors laboured, who often mistook the time or place of making a legal demand and re-entry; and therefore, the legislature say, the lessor shall re-enter only if there be no sufficient distress; but if, by looking over the next hedge, he can see an ample remedy for his rent, he shall not dispossess the tenant. With this view of the difficulties attending the execution of re-entries, would any man of sense think that he had any better guide for the framing his clause of re-entry, than to take the statute for his guide? And can we conceive that the settlor meant, that for 1*l.* one half year's rent, a merely nominal sum, there should be an actual re-entry, when by merely looking over the next hedge, the lessor would in all probability see an hundred head of cattle which he might distrain? If the lessee is a purchaser of this property, he pays a great sum for his lease. I am surprised, that it has seriously been argued in a case affecting those who have actually purchased for a valuable consideration the whole beneficial estate, for such are these lessees, that the great dangers and difficulties affecting a suit in replevin are a solid reason for the Plaintiff's construction. What! can it be supposed that a tenant who buys the estate for three lives, and has so valuable an interest, will be so mad, that for one pound he will resist the payment,

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and replevy the distress? So with respect to the supposed hardship of searching every part of the premises for a distress, can it be supposed, that these estates can ever be in that dilapidated state, that the lessor can be at a loss, looking round the farm, to find a dung-heap, or some property in some corner which will sell for 1*l*.? These are arguments which in my judgment ought not to weigh with liberal and intelligent minds. Another argument is pressed: it is said, and therewith I perfectly agree, that in the execution of this power the great object is this, that upon no occasion shall the remainder-man suffer in any respect, nor be put in a worse condition: but we are also to bear in mind, that these powers have been transferred from equity into law, and that an equitable and liberal construction shall be put upon them, and that they shall always be so construed, as that they may be reasonable: their equitable construction is that, which will neither work an injury to the tenant, or to the reversioner, or to the remainder-man next entitled to these rents. And, let me present for consideration, what possible injury can arise to that person in remainder under the power as it now stands, which should require for his security a power of re-entry at common law, such as the strict and literal execution of this power would give him, liable to all the difficulties of a common-law entry, instead of his having the beneficial and easy re-entry given by the statute, enabling him upon the non-payment of his one pound by the space of half a year, to proceed by the easy remedy of ejectment? But we are pressed with authorities in this case; and I feel it necessary to make some general observations on the cases of *Coxe v. Day*, and *Hotley v. Scott*. As to *Coxe v. Day*, I concur to a certain degree with my Brother *Wood*, who shewed some disposition to differ with that case. That, however, was not the case of an estate for lives at a nominal rent,

rent, but a note of *Hotley v. Scott*, which, though not accurately reported, sufficiently enables us to perceive what the decision in that case was, differs diametrically from *Coxe v. Day*; and I can say, *magno se jndice quisque tuctur*; and I feel warranted in my opinion, that *Coxe v. Day* is not law, and that it is diametrically opposite to law, and even to common sense; and when I consider of whom that Court was then composed, my Lord *Mansfield* and Mr. Justice *Aston*, to say nothing of the others, the case is of great authority, and the very point now in dispute was there decided. Mr. *Dunning* mainly relies on the annexation of the qualifications, and Mr. *Bearcroft* principally argues that the clause of distress was productive of no injury to the party, and that it was doing no more than the statute had prescribed. The reasons of Lord *Mansfield* I think I understand, though certainly the expressions were mistaken there, by a gentleman now respectable at his time of life, then a very young man; but it is plain to see that Lord *Mansfield* held, that the reason of inserting the clause of re-entry being merely to secure the payment of the rent, whatever was adequate to that purpose and occasion was sufficient; and, that it would be contrary to the spirit of the statute, and contrary to reason, that the lessor should enter for the non-payment of the rent when there was a sufficient distress: and there it is observable that it was a beneficial rent, not a nominal rent, as this is; but even in that case, Lord *Mansfield* holds that it was no more than a reasonable and proper qualification, and although the re-entry was subjected to that qualification, His Lordship and all the Court held it to be a valid execution of the power. Having expressed myself so fully upon that case, I shall not enter deeply into the question whether the extrinsic evidence was properly admitted, because I ground myself upon the circumstance, that the proviso in this case is proper, and

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adequate to the occasion, merely being intended as a security for the payment of the rent. Without venturing to go so far as my Brother *Wood* has gone on the present occasion, and to say that that statute has precluded every other mode of proceeding, I hold that the lessor wisely and properly takes this statute as his guide; and I say, that, in effect, the proviso in question puts the remainder-man in a better situation, because the one, strictly and penuriously construed, leaves the remainder-man to his dry remedy at common law; the other, reasonably expounded, gives him a beneficial remedy afforded by the statute. Were it, however, necessary to decide the point, I should not fear to hold, that the extrinsic evidence was properly admitted. This is neither an *ambiguitas latens*, nor *patens*; but I found myself on the circumstance, that this is a general and indefinite direction, which hereby requires an exercise of the judgment, in giving form and expression to the proviso required. If there must necessarily be an exercise of the judgment, can it be better guided, than by examining how the estate was managed and demised, at the time of the creation of the settlement? If there be any ambiguity at all, it is an *ambiguitas patens*, and then it cannot be holpen by averment; but it is no ambiguity at all. I mean to throw no doubt on the doctrine of *Cook v. Booth*, that where parties have used express language, the conduct or apprehension of the parties, or other evidence *aliunde*, cannot be admitted to explain it away. But the case of *Cook v. Booth* had express covenants, which in their language imported a perpetual renewal: those covenants, which, according to the plain sense of the words on the face of the deed itself, did express, or might be construed to express, a perpetual renewal, could not receive explanation *aliunde*, namely, by the construction which the persons executing successive leases, and their lessees,

had put upon it by a more qualified covenant, exclusive of that which went to a further renewal. But the cases which have been cited by my Brother *Park*, though they establish that doctrine beyond all question, are perfectly distinct from the present, for reasons which I will not repeat. I therefore think the judgment of the Court of King's Bench is perfectly right, and that it ought to be affirmed: but I cannot close my judgment without noticing that which has been thrown out to invalidate the credit of the judgment in the Court below, namely, that when this case was there decided, that Court was not full: whenever any Judge is abstracted from the whole number, it certainly weakens the weight of the Court, but I know that this was not an unadvised opinion, but formed on great deliberation; and great judgment. For these reasons, I am obliged to say, that I am clearly of opinion, that the judgment ought to be affirmed.

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Richards C. B. However painful it may be to me to differ from some of my learned brothers, and whatever consolation I may derive from concurring with the others, I know it is my duty to form my judgment without reference to either feeling. The question is whether there is a due execution of the power to lease, in a settlement made upon the marriage of *Lord Vernon* with *Louisa Barbara Mansel*? If the lease is according to the power, there is an end of the question; if the lease is not according to the power, that lease is void. The question, then, here is, whether the lease is void or not? And if the lease be void, (I beg leave to introduce this, to get rid of a very strong argument of a very learned person,) there is an end of the application of the statute of the 4 *Geo. 2.*, for, that only acts on leaseings and lettings in force, so that we must come back, notwithstanding that statute, and notwithstanding the proceedings in equity, (with which we here have nothing to do,) to

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the real question, whether this attempted execution of the power to lease has been a due execution of it? Now it is remarkable that perhaps there can hardly be said to be any uninfected decision on the subject. With respect to the enlargement of the time, I do not know any decision. With respect to the introduction of the other words concerning the distress, there are the conflicting cases of *Hotley v. Scot*, on the one hand, and of *Coxe v. Day* on the other hand: there is also this case now before your Lordships; so that, in the present state of the doctrine upon this subject, it becomes extremely important, as it seems to me, to consider this case with great care; and I shall make no apology, if I obtrude upon the Court by stating again the situation of the parties to this settlement, and the provisions made by it. I believe it is now perfectly established that the only thing to be attended to in the construction of powers of this description, or any other powers, is to ascertain the intention of the party creating the power. The party, who creates the power, is the legislator in the particular case; he may impose whatever terms he pleases, provided those terms are not inconsistent with any rule of law. It is not the province of judges, as it seems to me, to enquire whether the requisitions are reasonable or unreasonable, provided they are expressed, and not inconsistent with any rule of law. In order to gather the intention of the parties, it becomes absolutely necessary, (at least in my view of the case,) to trouble you with some consideration of the situation of the parties, who made this settlement, and also with some consideration of the instrument itself. Miss *Mansel* may be considered as having the absolute dominion over this property, which belonged to her father, who gave it to her for life, with a power of appointment. She married a gentleman, who afterwards became Lord *Vernon*, when she appointed the estates, which were entirely

entirely hers, to the use of Lord *Vernon* for life, remainder to herself for life, remainder to the children of the marriage, then to such persons as she should by will appoint, (not by deed,) with remainder, or reversion rather, to herself and her heirs and assigns for ever: so that, with the exception that she interposes an estate to Lord *Vernon* for life, with a power of leasing, she reserves to herself, and to her own disposition, the entire dominion over the estate. The deed of settlement contains three different powers of leasing adapted to three distinct parcels of the estate, and those powers are to be executed by Lord *Vernon* and herself respectively, when in possession. Thus, Lord *Vernon* became tenant for life of the estates in question, with powers of leasing according to the terms of the settlement, whatever they are, and, it is according to those powers that he does affect to lease the estates, which all moved from Miss *Mansel*. I observe on this, because a distinction has been sometimes taken in the exposition of leasing powers, between those powers which are to be executed by the creator of the power, from whom the estate originally moved, and those which are to be executed by a lessor to whom the estate did not originally belong. It has been sometimes supposed, that less latitude ought to be allowed in the construction of a power in the latter case than in the former, but it is not my intention to discuss that distinction, or consider whether it is well founded. It is material, however, to advert to each of these three powers, before we can enter into the validity of the lease, which now presents itself for our consideration. I shall first take that which respects the mines: that power is expressed to be, to lease any part of the premises wherein there is any mine open or to be opened, for any term of years not exceeding 31 years, to take effect in possession, and not in reversion, so as upon every such lease there be reserved and made payable,

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during the continuance of such lease, such share of the ore, or such yearly rent or income as can be reasonably had or obtained for the same: this is all which is said of the rent, and no power of re-entry is required. The second power applies to another portion of the lands: it is a power to lease for any number of years absolute, not exceeding 21 years, to take effect in possession, and not in reversion, reserving the best and most improved rents, as is said before with respect to the leases of mines, and "so as there be contained in every such lease a power of re-entry, in case the rent or rents thereupon to be reserved be behind, or unpaid, by the space of 28 days, after the times thereby respectively appointed for payment thereof." The first description of power requires no re-entry upon the non-payment of the rent at any particular time; but here, there is a clause of re-entry to be reserved, provided the rent be unpaid 28 days after the day appointed for the payment thereof. The settlor has declared the law on the subject; and it seems to me, that if the rent should remain unpaid beyond the 28 days, the lessor or other reversioner would be entitled to enter, and, that the lessor and lessee could not introduce any other terms more favourable to the lessee, or to the tenant for life; to the lessor, because whatever is most favourable to the lessee, is so to the lessor. The reversioner is as much a purchaser of his reversion, as the lessee is of his interest, and the reversioner is to be favoured at least equally with the lessee, who is no stranger to the title which he takes, and must be presumed to have knowledge of the title of the lessor under whom he is taking, and into which it is competent for him to enquire. The reversioner is as much a purchaser as the lessee, though he acquires his estate by being named in the deed to which he is no party, by the creator of the power, and so is a stranger to the title,

title, which he has no opportunity to examine. In both these instances there is to be no fine, premium, or foregift, so that the lessor is to have no other benefit against the reversioner in these two cases, than the advantage of securing a tenant for a given number of years, rather than for his own life, for which period he might grant a lease without any power at all: a lease for a given number of years may be more beneficial to him than a lease for life. The next, and only remaining power, being the power whereof the construction is submitted to us, is quite different; that is a power to lease such parts of the estates as were at the time of the settlement leased for life or lives, to any person or persons in possession or reversion, for one, two, or three lives, and so as in every such lease there be reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, or a just proportion of such ancient, or the present reserved rents, and so as there be contained in every such lease a power of re-entry for the non-payment of the rent thereby to be reserved. This, clearly, is a power of leasing, under which, the lessor, tenant for life, has a right to take as great a fine, premium, or foregift, as he can obtain, which is a privilege necessarily, in many instances, to the disadvantage of the reversioner; because, if the term be not out until after the death of the tenant for life, the reversioner has nothing but the accustomed rent, and, therefore, it cannot be matter of surprize, if, in laying out the property among the objects of her attention, *Miss Mansel* should protect the reversioner, who may be her child, or her appointee, and therefore will still be an object of her attention, by requiring more restrictions and protections than in the other cases; for this is in fact a question between the tenant for life and the reversioner. The lessee
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has a right to cover himself by the (a) covenant of the lessor, and will be entitled to recover a compensation from his assets, in case of any breach of his covenant; so that the lessee is really protected, and the reversioner is injured, if the terms are not properly attended to. Now, on the 5th of September, 1803, Lord *Vernon* grants the lease, which is the subject of the present action, for 99 years, if three lives should so long endure, at the yearly rent of 2*l*. I do not think it necessary to dwell upon the quantum of the rent, for the construction must be the same, whatever that be: if the ancient rent had been 100*l*., the words import the same thing. This rent is reserved payable at *Michaelmas* and *Lady-day* in every year, and this was the ancient and accustomed rent. Then, the lessee covenants to pay the rent, and then, it is provided, that if the rent shall be unpaid by the space of 15 days, and no sufficient distress on the premises, it shall be lawful for the lessor to enter, and possess the premises free from the lease. The real question is, not whether this clause is agreeable to the words of the power contained in the settlement, as applied to this portion of the property of Lady *Vernon*, (for beyond all question it is not conformable to the words of the power,) but whether those words are, by some latitude of construction, to be so construed as to warrant the introduction of the expressions in the proviso? In looking into an instrument, especially an instrument where the intention of the parties is to be learnt, the examination must be conducted carefully, and with reference only to itself, unless it refers to some other instrument, or some extrinsic matters. It has been argued at the bar, that the settlement requires only a power of re-entry, and that such requisition and

(a) *Quere de hoc*. For the usual covenant of a lessor restricts himself and those who claim under him. his liability to eviction by the acts

a due execution is to be inferred from the introduction of a power into the lease; or, in other words, that it is thence to be inferred, that any power in the lease would suffice, if it suited the taste of the person who is to judge of it. Who is to judge of it? A judge or a jury? Surely it will not be said, that the tenant for life is to judge of it: it cannot be supposed that the author of this settlement, who gives a power to lease in these words, or in any words ever used in a power to lease, meant that the tenant for life should lease as he pleased; if so, he might lease the whole fee out. There must be, therefore, some decision upon the power, either by a judge or a jury, but certainly not by the person who is to execute the power. For my own part, I confess I do not feel the weight of that argument. The words *the* power, which might have been put in instead of *a* power, would not have been more useful or expressive than the word *a*: the meaning must have been the same, whether the settlement had required *a* power, or *the* power of re-entry. To consider, then, the real object of contest. The words of the settlement are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." The objection to the lease is divided into two parts; first, that the power of re-entry is not given on the non-payment of the rent, but at an enlarged period, namely, fifteen days; and, secondly, it is said, the reversioner cannot enter, if there is a sufficient distress on the premises. If either of these objections prevail, it is fatal to the title of the defendant; and I will not now form any decisive judgment, if my judgment could be decisive, whether an enlargement of the time would be fatal to this lease. It seems to me, that the words of the power are plain and specific. If the ancient rent was to be reserved, payable at the usual times, and necessarily on a given day; and if, on non-pay-

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payment at that day, there is to be a power of re-entry, it must be allowed, that the power to lease must be observed in a lease intended to be made pursuant to that power; but how can a power to re-enter at *Michaelmas* be consistent with a power to enter 15 days after? The rent is reserved at *Michaelmas*, it is not, therefore, consistent with that reservation, that the lessor should not enter till 15 days after the rent becomes due. It is so far, therefore, derogatory from the reversioner's right to re-enter, and, therefore, as it seems to me, in substance not within the power. Then, as to the argument, that a hardship is thrown upon the lessee, I must deprecate any consideration upon that point. The judges are to expound an instrument on their best judgment, without reference to the hardship on the one side, or the other: but what hardship can be stated, which does not belong to both parties? for the reversioner is as much entitled to complain, if he has not the property according to the intention of *Lady Vernon*, as the lessee has, if he mistake the title to his lease; but, with this difference, that he has his remedy against *Lord Vernon's* estate. (a) Upon the objection with respect to the enlargement of the time, I should certainly have great difficulties, before I could aver, that, in my opinion, the lessor has executed the power of leasing such as it is prescribed. I cannot feel any doubt, except that which I feel from the difference of opinion expressed by learned men; because this is a power of re-entry, in case the rent is in arrear for 15 days, and not sufficient distress on the premises. The provision throws on the reversioner a difficulty, in my opinion, inconsistent with the power to lease. Under the power to lease, there can be no doubt, that if the rent was unpaid on the day on which it was reserved, or take it 15 days after, then the right of

(a) See note (a) ante, p. 202.

re-entry was given, and intended to be given; and, beyond all doubt, it was given with great propriety, for it will be the fault of the lessee, if he suffer his rent to run in arrear: he may pay it in due time; but, if he neglects to do so, is he to be allowed, by a contract between himself and the tenant for life, who claims adversely to the reversioner, to throw upon the reversioner the charge of employing persons to examine the premises for distrainable property, and the risk of losing his ejectment by it? Your Lordships cannot forget the inconveniences pointed out by the Plaintiff's counsel in the course of his argument, and we cannot but feel these difficulties. I confess, it seems to me to be a monstrous proposition, that a person, who has not the authority given him by his right to lease, may impose these terms in operation of the reversion, which are extremely inconvenient, and very injurious to the interest of the reversioner. Let us next look to the other parts of the settlement. With respect to a great part of the estate, the power of re-entry is prescribed in a different form from that before us. I do not know that this weighs much. Am I not to understand, in the other parts of the deed, that when Lady *Vernon* fixed the right of re-entry for 28 days after the rent became due, and when she gave the lessee no day after the rent became due, she meant that the rent should be paid at the time fixed? In one case she gives 28 days, and in the other, no day is given. One word more as to the power immediately under consideration. The lease of the mines, &c., and, indeed, of the manorial lands, must be in possession, and not in reversion: the lease under the power before us may be in possession or in reversion. Now I beg the particular attention of the Court to the distinction here: how could the sufficiency or insufficiency of distress exist on a lease in reversion? What distress can be made on a tenant, who is not in possession,

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sion, and has no right to possession for 20 years to come; and can it be imagined, that it was the intention of the donor of this power to lease, to give another power, adding to it the terms, "you shall not enter if there is a sufficient distress," when there can be no distress? Perhaps it may be said, that the right of re-entry is given when the lessee is not in possession: it is so, but the lessor has a right, in consequence of the non-payment of rent, to re-enter when the lessee comes into possession. The distress, as applied to this lease, is perfect nonsense, and I think it must shew, that if the parties knew what they were writing, they could not intend to insert the qualification of the want of sufficient distress in a lease in reversion: if the donor had said so in the power, it might have been inserted in the lease. Here, it is said to be a reasonable construction of the power to lease, that a man should not put an end to it, unless it be in the case of no sufficient distress. It seems to me, that to apply that qualification of want of sufficient distress to such a case as this, is to break in very much upon any intention of the parties, of which I can form any idea. In this particular case, the lease was in possession, but that does not at all alter the construction of the power as to leases in reversion. I throw this out, as a circumstance, amongst others, which guides us to the intent of the parties, and shews it to be impossible, that the settlor could have relied on the power of distress as a remedy for securing the rent, or, on any other remedy, except the power of re-entry, during such time as the estate continues in reversion. In the way, in which it is proposed to apply this power, the parties are supposed to have intended to enlarge the right of the lessee. All must allow, that a right of re-entry was intended, if the rent was not paid, but if there be a sufficient distress, then the right of re-entry may be prevented during the whole residue

of the term; so that the tenant for life who has received the fine, premium, or foregift of 2000*l.* (by way of example,) is to have the benefit against the reversioner, to the end of the term, because the judges of the land have said, that this clause shall be inserted as a reasonable clause, which is directly, as it seems to me, in contradiction of the intention of the settler of the estate, because it would prevent a re-entry, which beyond all doubt was intended to operate at some time, if the rent was unpaid. Under these circumstances, it does seem to me, that the settlor could not have intended that any re-entry, except a re-entry *instante*, on the non-payment of the rent, should be sufficient, and that the judgment of the Court below is erroneous. With respect to the other question, whether the prior leases were properly received in evidence, I shall merely refer to the case of *Baynham v. Guy's Hospital*, and the other cases quoted by my Brother *Park*: they are cases with which my Brother *Graham* and myself have been long acquainted: they have been acted on with great truth and justice; and I think they have settled, that the former leases cannot be read, to shew what was the intention of the party. With respect to *Coxe v Day*, I cannot help observing, that when the case was made, it was made by a very great judge, Sir *William Grant*; and I observe, that if *Holley v. Scot* was considered as a decision by which we were to abide, it is very singular, that that learned Judge should send the case with the same particular question. It is quite clear, that, in the estimation of the learned person who sat on that Bench, and the counsel, there was no decision upon the subject; and the Judges of the Court of King's Bench all concurred in stopping the Plaintiff's Counsel in his reply, and in expressing their opinion, that that lease was void, as not being conformable to the power; and that certainly is, according to my knowledge, the last case upon the subject. I, therefore, con-

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our with my learned Brothers, Mr. Justice *Park*, and Mr. Justice *Barrough*.

DALLAS C. J. This case has been repeatedly argued at the bar, and most ably in each instance; and the subject has been exhausted in observation and authority. It now appears, that, not only the two Courts differ in opinion, but, that there is a difference between the learned judges this day present also; and the question, whatever the result may be, must, therefore, be considered as one of considerable doubt and difficulty. The principles, which apply to cases of this description, are not in dispute, and the leading rule has been already stated in the course of this day. No intent can be implied against that which is plainly expressed; but, if there be a doubt upon the words, the construction must be reasonable, and according to the intent of the parties, as it is to be collected from the whole instrument, comparing the different parts with each other; and, I say, from the instrument, because, if from this a clear intent can be collected, a Court is not at liberty to go out of it, or engraft upon it what may appear to itself to be reasonable; for this would be not to construe, but to make a deed for the party, and the question is, not what the power ought to have been, but what it is. The power in question relates to leases of different descriptions, to leases determinable on lives, on which the ancient rents are to be reserved, and leases for years, at the best or most improved rent. The former were to contain a proviso for re-entry generally for non-payment of rent, the latter were to contain a proviso for re-entry, twenty-eight days after the rent should be in arrear, and the present case is of the first description. It is objected, that the clause of re-entry varies from that directed by the power in two respects: first, by making the right of re-entry to arise not upon the non-payment of rent generally, but fifteen days after

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after such non-payment; and, secondly, by giving it only in case there shall be no sufficient distress found on the premises, or any part thereof. I shall examine each of these objections separately. And, first, as to the fifteen days. The power is silent in this respect, directing a right of re-entry on non-payment of rent, and saying nothing more. It has not been contended, that, if the lease had followed the power, and there had been no mention of time, the clause for re-entry would have been uncertain; or, taking it to be sufficiently certain, that the right would not have accrued on the rent becoming in arrear; nor has it been argued, that such would not have been a good execution of the power. It is clear, therefore, that the words added produce an effect different from that which would have followed, if the words of the power had been pursued; and, that the effect is to convert a present into a future right. In the case, therefore, of the death of the tenant for life, the right of the remainder-man to re-enter for non-payment of rent, would be postponed for fifteen days beyond the time, when it would have arisen, if the words of the power had been followed. *Coke Littleton*, s. 325., has been this day referred to in support of the lease; but I understand it differently; for the distinction is taken between a right to re-enter generally on non-payment of rent, and a right to re-enter after a specified time, which, in the latter case, it is said, must depend on the time specified in the condition, and is, therefore, various, being matter of agreement in each case between the parties; thus, excluding the notion, that there is such a thing as reasonable time abstractedly considered. It is to be considered, then, on what grounds the proviso in this case can be said to be a due execution of the power; and the first ground I take is this: it is said, that as the power directed a

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proviso for re-entry on non-payment of rent generally, and without specification as to time, it must be intended, that a reasonable right of re-entry was intended, and that the time given is a reasonable time. But to this I cannot agree; it is an intendment against express words, and words of clear and definite meaning, for the right of re-entry is to accrue on non-payment of rent; and the time, when a right is to attach, is as well specified by the occurrence of an event, as if time itself were expressly mentioned, and here the event is specified; namely, the non-payment of rent. It is, however, said, that the intention of the party is to be considered; and, that it is unreasonable to suppose that he could have meant a provision of such harshness, as, that a tenant should be ejected, the very moment his rent was in arrear: but the intention of the party is only to be considered, as it is to be collected from the instrument itself, and on the instrument so considered, I can entertain no doubt what the party meant; because he has, to my understanding, made use of plain and sensible words. But, supposing it to be a provision of harshness, though this would be fair to urge, if the words of the power were doubtful, and I agree, therefore, it is fairly urged by those who so consider them, yet, if the words be sufficiently clear, we are not at liberty to enter into the consideration of harshness, and still less, to set up whatever our notion of harshness may be, to justify a departure from the power. What the power orders to be done must be done for this one reason, of itself sufficient, that it does so order. It is next urged, that looking to other provisions in the same deed, and applying them to the question of intention, the power must be taken to intend, what the party executing it has in effect done; and, when twenty-eight days are expressly ordered to be given in the case of leases for years, in which the rent would be of real value, can it

be supposed, it is asked, that in case of a rent merely nominal, a right for immediate entry would be intentionally prescribed? Comparing, therefore, the two cases, it is said, the proviso was intended to give time in each instance, and that the reason would be stronger for postponing the right of re-entry in the former, and making it immediate in the latter instance. But here again, protesting against departing from plain words, and supposing myself at liberty to consider what the intention was, on what ground am I to infer, that it was intended to give fifteen days for payment of rent, in a case in which the power says nothing of the kind, because, in another case, and of a different description, time is given, when, it is said, there was less reason for giving it? On all legitimate grounds of construction I feel myself bound to reason differently. If the party distinguishes for himself, I am not at liberty to destroy the distinction: nothing being said as to time in the one case, and time being given in another, proves at least that time was under consideration; and even if, in the case of a single proviso, a reasonable time from the generality of the power could be implied, I should say that emphatically, in this case, it cannot be implied, because the second provision, if to operate at all, throws light upon the first, and shews, that when time was intended to be given it is so expressed. Thus the case appears to me on principle; but *Jones v. Verney* has been cited, as shewing that where the power directs generally a clause for re-entry, a reasonable time may be implied, although the power is silent in this respect. All, however, that case proves, is, that it was done in the particular instance without objection; but, what the decision would have been, if the objection had been made then, as it is made now, we can only conjecture one way or the other, as we think that it ought now to

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succeed or fail. It leaves the question, therefore, as a question altogether new, this being the only case referred to; and on principle I am at a loss to understand, how it can be taken as universally true, that when a power prescribes a proviso for re-entry on non-payment of rent, but is silent as to time, the power, because it is silent, must be taken to speak. And what is reasonable time? Is it to be treated as matter of fact, or matter of law? Is it for the jury, in the first instance, or for the judge? How is it to be ascertained what time is reasonable? On looking through the reported cases, in which it occurs as matter of express condition, we shall find it different in almost every different case: it is so here; as to one set of leases fifteen days are given, in the other 28; shall I say it is reasonable in the former, and unreasonable in the latter, or what measure am I to take? In the cases in the books, it is sometimes 15 days, sometimes 20, sometimes 42, sometimes 60, in short, mere matter of convention, and, therefore, peculiar to each. Will any of these cases furnish the rule, if not, what other cases are we to look to, or where is the line to be drawn? These are difficulties which press forcibly on my mind. It is said, however, that the party to execute the power is to be the judge of what is reasonable, and so he may be in the first instance, if directed so to do, but if otherwise, I should scarcely think it ought to be so left. But, be it so, the difficulty remains the same; for, on a question arising between him and the remainder-man, who is to decide but a jury or the Court? The same difficulty occurs as to amount. Is it to apply to two pounds, five pounds, or any, and if so, what sum? The difficulty in drawing a line as to time applies also to rent. These are objections, to which I cannot easily find an answer. On the other hand, the line seems plain and direct; when
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parties have spoken for themselves, let Courts abide by what they have said: but when words are clear, to seek in a doubtful construction for an uncertain intent, in order to get rid of what may appear harsh, will only lead to litigation, conjecture, vexation, and ruinous expence; in a word, to all which this case has already manifested, and will more fully display, before it shall have attained its close. We are told, however, that if this objection were now to prevail, it would invalidate a great number of leases granted under powers in this kingdom. The fact may possibly be so, and this consideration demands caution. I wish, therefore, to avoid deciding expressly on this ground, whatever may be my view of the subject, as there is another, which, taken singly, is decisive to found the opinion which I form. And this brings me to the remaining objection, viz. that part of the power which relates to there being no sufficient distress on the premises. And here again the ground taken is only an extension of the former ground: it is a wider stride of the same exceptionable sort. All the former observations apply, therefore, with increased force, and I shall content myself with referring to them. It will scarcely be said, after the case, to which we have been referred, *Rees v. King*, in which there was such a proviso in the lease, and the party was nonsuited, for not proving that he had searched every part of the premises, a single cottage remaining unsearched, that such a clause is of indifferent or immaterial operation. On what ground then is it now sought to be justified? First, it is said, that it does no more than the law would do without it, and, that therefore, by analogy, it is reasonable: but to this I answer, then leave it to the law; if, by law, the party will be on the same footing, in effect, without these words, as with them, why introduce them? It is said, however, that a clause of

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re-entry for rent in arrear is considered as in the nature of a mere security for rent; that, supposing entry to have been made, still, if not submitted to, an ejectment must be brought, and then, that by the statute, on payment of the arrears of rent, and all the costs, the proceedings would be staid, and thus the right to re-enter be destroyed. To this it is added, that, by the same statute, the landlord must prove, that there was no sufficient distress on the premises, so that the law itself subjects him to the necessity of searching for a distress, before his right to re-enter can avail. And this is true, applied to a proceeding under the statute, and if a party shall elect not to re-enter under his right, but shall avail himself of the statute, in obtaining the benefit, he must take upon himself the burthen, and prove, because the law upon which he proceeds says he must prove, that there was not a sufficient distress. But if he choose to stand upon his stipulated right, and take the chance of all the difficulties which may attend demand and re-entry at common law as applied to such right, he is not bound to distrain, and in this respect he may choose for himself. On the other hand, the tenant may get rid of the right to re-enter, by paying up the arrears of rent with costs, but he may not do this, or he may not be able to do it, and, in either case, the landlord succeeds without having been bound to search for a distress, and, where he stipulates not to be so bound, it is competent to him so to do: so it would be under the statute in the case of a valid lease, but, here, the question is upon the validity of the lease itself, which depends on a due execution of the power; though, I admit, the argument is only urged to shew, from a supposed analogy, that the proviso in question is not inconsistent with a due creation of the power. But this doctrine was equally resorted

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resorted to in the case of *Core v. Day*. It was said, "inasmuch as the tenant coming in and paying the arrears and costs would be relieved, such a clause is now become merely a clause *in terrorem*." But Lord *Ellenborough*, interrupting the counsel, observed, "surely the direct power of re-entry is more beneficial to the landlord, and the very statute itself shews the difference." The case of *Hotley v. Scot* has however been referred to, as an authority in favour of this part of the case, and obscurely as we have it reported, and the particular point not being at all adverted to in the decision, still as the decision must have been different, if the objection now made had been deemed a valid objection, I think it in fairness may be taken to be so: as far as we can trace what it was, it was a decision in favour of a power similar to the present. But giving all the weight that can belong to this case in point of authority, still, as a single case and a case so imperfectly reported, and so militating, as it seems to me, (and I speak it with deference,) with first principles, I should not feel disposed to subscribe to it, if it were not opposed by any other decision, but which I conceive it to be by *Core v. Day*, on which so much has been already observed, that I shall not feel it necessary to dwell long on it. It is in point, unless the present case can be distinguished from it on the grounds on which a distinction has been endeavoured to be raised: I shall therefore examine whether these grounds are sufficient so to distinguish it. And, first, it is said, that in the case of *Core v. Day*, the Court had only to construe a power prescribing a right of re-entry as applicable to a particular lease; but, that, in this case, it is a question of intention to be determined on a comparison of distinct provisions, and, that, from such comparison, the conclusion results, that the power must have intended the proviso in question

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question to be such as it is found in the lease. I will not repeat what I have already said in this respect: I deny that there is any ambiguity, or any generality to give discretion or call for implication, or intention, and even comparing the separate provision with a view to get at intention, if intention were doubtful on the precise words, the reasons become stronger in my view of them, against adding the words in question. The next ground resorted to is the ground of the former leases, which, it is contended, are admissible evidence, and which leases contain a proviso precisely similar to the present, as applied to the property in question. It seems scarcely necessary to say, for it follows as a consequence from all I have hitherto observed, that, in my opinion, these leases are not admissible where no uncertainty results from generality, and where nothing is left deficient in point of expression. Where there is no reference to any matter dehors the instrument itself, recourse cannot be had to foreign matter; and I think no uncertainty or ambiguity belongs to the instrument in question, nor are there any words of reference to connect it with any other whatever in this respect. But not so in other respects; for, as to the rent, when former leases are intended to govern, they are expressly referred to, and it is said "the ancient rent," that is, the rent now reserved by subsisting leases shall be the rent under this present power. So, as to the power given to let leases of mines; they are directed to have the proper and usual covenants, such as are usually inserted in similar leases: but, as to the proviso for re-entry on non-payment of rent, there is no reference to any other lease, nor any words making it necessary to refer to any matter, extrinsic to the instrument. But, for the purpose of argument, take the leases as admitted, how do they remove the difficulty? Because in former leases not re-

ferred to, or even pointed at, there is a provision of a particular description, shewing, that when a right of re-entry was intended to be subjected to the want of a sufficient distress, it is so expressed; does it follow, that in a subsequent lease the same thing is, therefore, to be implied when not expressed? Even supposing the former leases to have been made under a similar power, still, it would only shift the question from this lease to those, or, taking it that the parties, by acquiescing in such leases, have put by their own words, it will only fall within the rule, that what is matter of legal construction cannot receive a different construction from the conduct of the parties concerned. The leases, if let in, would with me leave the difficulty where it was, proceeding on what I deem grounds of legitimate reasoning; but it is enough to say, that for the reasons already given, I hold them to be inadmissible. Even if, looking out of the instrument I should conjecture that the maker of the power did so intend, and would have so said, if his attention had been drawn to the subject, it would not be a conjecture on which I should feel myself at liberty to act; but to this case, as to many that have gone before, and many that in all probability will follow, the important principle must be applied, that the intent is to be the rule of construction, if the words will bear it out; but, if the force of the words be such, that the intent cannot be complied with, the rule of law must take place, and the words prevail. A single observation on the case of *Coxe v. Day*. I admit it must be taken, that, in the opinion of the Court below, that case and the present are dissimilar; but, as I cannot distinguish them on the grounds on which the decision proceeded there, or the argument has been rested here, the distinction, to my judgment, fails altogether; and *Coxe v. Day* itself, being considered by me

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me as properly decided, becomes with me an authority in point. On the only remaining ground, the general clause for re-entry in the concluding part of the lease, having delivered my opinion so fully on the other points, and deeming this less material, and more particularly so, as no reliance has been put upon it, in the course of the several opinions delivered this day, I shall content myself with referring to what has already been said. The result is, that the judgment of the Court of King's Bench must be reversed.

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GORTON and Another, Executors, v. DYSON
and Another, Executors.

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THE Plaintiffs were the executors of *Mary Sandford*, deceased; the Defendants were the executors of *James Holland*, deceased, who was executor of *Frances Holland*, deceased.

This was an action for money had and received by *James Holland*, in his life-time, to the use of *Mary Sandford*, in her life-time. The Defendants pleaded first, the general issue; secondly, *non assumpsit infra sex annos*; and, lastly, a plea of set-off. The Plaintiffs took issue on these pleas. At the trial at the *Middlesex* sittings after *Hilary* term, 1819, before *Dallas C. J.*, it appeared, that *Frances Holland* had bequeathed 1200*l.* to *Mary Sandford*, and that *James Holland* had made his will, and therein acknowledged, that he had received this sum of 1200*l.* for the use of *Mary Sandford*. Notice was given to the Defendants to produce the probate, but no evidence was given to prove that the probate was in the possession of the Defendants: the probate was not produced. An officer of the spiritual court of *Chester* produced a document, purporting to be the original will of *James Holland*, and bearing the seal of the ecclesiastical court of *Chester*; by which will, after bequeathing an annuity to his sister *Mary Sandford*, the testator declared "that the annuity so given her was to be in full discharge, and she was to accept the same, in full satisfaction and extinguishment of a certain debt or sum of 1200*l.*, in which he stood in-

Where the Defendants, having had notice to produce the probate of the will of their testator, refused to produce the same: held, that an instrument, produced by the officer of the ecclesiastical court, purporting to be the will of the Defendant's testator, and indorsed by the officer, as being the instrument whereof probate had been granted to the Defendants, and, that they had sworn to the value of the effects, was admissible in evidence in an action against the Defendants for money had and received by their testator in his life-time.

The Court entertained the argument, notwithstanding there had been an injunction in the Court of Exchequer against further proceeding in this court.

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“debted to her, as and for a legacy, theretofore be-
 “queathed to her by the testator’s late aunt *Frances*
 “*Holland*, and for which the legatee was to execute a
 “good and valid release to the testator’s other executors
 “accordingly, as soon as might be after his decease;”
 and the plaintiff relied on this, as an acknowledgment
 by the Defendant’s testator, that he had received this
 money to the use of the Plaintiff’s testatrix. *Hullock*
Serjt. for the Defendants made two objections; first,
 that the will ought to have been proved by one of
 the subscribing witnesses, and that, the probate not
 being produced, the next best evidence was the act of
 the spiritual court, which was not produced; secondly,
 that this was, in effect, an action for a legacy, for which,
 according to *Deeks v. Strutt* (a), an action at law would
 not lie, and, more particularly, an action for money had
 and received. *Dallas C. J.* held, that the will, as pro-
 duced, was admissible as secondary evidence, because
 the probate, which was the best evidence, was not pro-
 duced by the Defendants; and, secondly, that the sam-
 in question was money had and received in the hands of
 the testator. His Lordship, however, saved both points.
 Verdict for the Plaintiff, damages 1200*l.*

Hullock Serjt. accordingly, on a former day, had ob-
 tained a rule *nisi* to set aside the verdict, and enter a
 nonsuit on the first point only.

Lens Serjt. hesitated to shew cause against the rule,
 on the ground, that the Defendant had obtained an in-
 junction in the Exchequer against further proceedings in
 this Court, and that his client was apprehensive, that the
 rule in that court was different from the rule in the
 Court of Chancery, (where the effect of the injunction

(a) 5 T. R. 690.

only is, to restrain execution in an action already commenced, but not to prohibit the Plaintiff from proceeding to judgment;) and, that he should incur a contempt of the Court of Exchequer in discussing the rule. The Court, however, considering this apprehension as unfounded, and entertaining the argument, *Lens* relied on the will, which, as it appeared by a fac-simile copy now produced in court, bore on it an indorsement, made by the officer of the ecclesiastical court, purporting, that probate had been granted to the Defendants upon that instrument, as the will of *James Holland*, and, that the Defendants had made oath of the value of the effects accordingly.

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DALLAS C. J. The ground, on which I admitted this instrument at the time of the trial, was, that it was secondary evidence, the probate being the best; and, not binding myself to decide whether it would be good as original evidence, I thought that, under the circumstances, it ought to be received.

RICHARDSON J. If the Defendants have acted on this as being the instrument whereof they have obtained probate, as of the will of the testator whom they represent, is not this instrument evidence to shew, that this paper, of which it is stated that they have obtained probate, was the writing of the testator, and is it not proof of that fact, as against them?

Hullock Serjt. admitted, that, if the document now produced was to be taken as proof, that the Defendants had treated this paper as the will of the testator, he could not argue that this will would not be evidence against them; but there was no proof of the identity of the testator, or, that the Defendants are the same *Dyson*

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and *Elliott* who took out probate. But the Court intimating their collective opinion, that the instrument was properly given in evidence,

The rule was discharged.

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TROTMAN v. HOLDER.

Where one of several issues is found for the Defendant, he is not entitled to his costs on that issue, though, in consequence of the Plaintiff's withdrawing his record at the assizes, for the purpose of an amendment, and re-entering it, the Defendant's witnesses were obliged to wait several days longer than they would otherwise have done.

TRESPASS, *quare clausum fregit*. Pleas, first, general issue, and issue thereon; second, right of way; third, *liberum tenementum*. The replication traversed the second and third pleas, and new assigned. Issue was taken on the right of way, on *liberum tenementum*, and on the new assignment. The cause was entered the first on the paper at the Gloucester Spring assizes in 1818, but the Plaintiff, having discovered an error in the name of the parish, withdrew his record, obtained leave to amend, and then re-entered his record, by which means his cause stood the twenty-third in the cause-paper. The cause was finally referred to a barrister who made his award in respect of the several issues, as follows; first, the general issue, (without any damages,) for the Plaintiff; second, the right of way, for the Defendant; third, the issue taken on the plea of *liberum tenementum*, (without any damages,) for the Plaintiff; fourth, the issue taken on the new assignment, (with 1s. damages,) for the Plaintiff.

Lens Serjt., on a former day, had obtained a rule *nisi* for the prothonotary to tax the Plaintiff the full costs of his cause, with the deduction of the costs on the issue found for the Defendant, by not allowing to the Plaintiff any costs on that issue.

Vaughan Serjt. now shewed cause against the rule, and contended, that the Defendant was entitled to his costs,

costs, at least on the issue which had been awarded in his favour. He argued, that it would be a great injustice to make the Defendant bear the costs of the whole, after he had succeeded in the most material point of the cause; and, especially, in this case, where, in consequence of the amendment which had been allowed, a large body of the Defendant's witnesses became wholly unnecessary. Another consequence, too, of that amendment, was, that the Defendant's witnesses, instead of being discharged on the first day of the assizes, were obliged to wait six or seven days, the cause having been removed from the top of the list almost to the end of it. He then cited *Gregory v. Ormerod* (a).

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Lens, in support of his rule, cited *Martin v. Valance* (b), as directly in point, *Asser v. Finch* (c), and *Beale v. Moor* (d).

The Court asked if there were any case, where one of many issues was found for the Defendant, in which the Plaintiff was obliged to pay the costs on that issue to the Defendant, and they cited *Postan v. Stanway* (e) to the contrary. The prothonotary said, that this was never done, except in actions of replevin, where both parties are actors; that formerly, in this Court, the Plaintiff, if he succeeded on one issue, had costs on all: now, he only had the costs of those issues on which he succeeded; but the Defendant did not receive the costs of those issues, on which the Plaintiff failed, unless he failed altogether.

The Court considered themselves as bound by authorities acquiesced in so long, and made the

Rule absolute.

(a) *Ante*, IV. 98.

(b) 1 *East*, 350.

(c) 2 *Lev.* 234.

(d) 2 *Str.* 1168.

(e) 5 *East*, 261.

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DALBY v. HIRST.

An usage for the landlord to pay a sum in compensation to the off-going tenant, for labour and expence bestowed by him in tilling, fallowing, and manuring arable and meadow land, according to the course of good husbandry, the advantage of which labour and expence the tenant could not otherwise reap, is a reasonable usage. And such practice, being a mere usage of the neighbourhood, is not to be considered as a custom, strictly speaking, and need not be immemorial.

The declaration averred, that the Plaintiff had sowed divers, to wit, 20 acres of land with wheat and clover: Held, that this was, in substance, an averment, that the land was arable.

The declaration also averred the manuring of 10 acres of meadow land: Held, that this was, in substance, an averment, that part of the land was meadow land.

ASSUMPSIT. The declaration stated, that on the 2d of May, 1800, the Plaintiff became tenant to Samuel Elam of a farm, containing forty acres, in the parish of Bradford, in the county of York, the reversion of the said farm being in S. E., and so continued till the 1st of January, 1807, when the reversion became vested in Joseph Hirst by assignment, whose tenant Plaintiff then became, and so continued till the 1st of December, 1816, when J. H. died, and the reversion vested in the Defendant, then being the son of J. H., and, that the Plaintiff became tenant of the farm to the Defendant. That, according to the due course of husbandry used and approved of in the country where the premises lay, the tenant of every farm containing arable and meadow lands, not being restricted from so doing by any special agreement, had been accustomed, from time to time during his tenancy, to bestow his work, labour, care, diligence, and expence in and about the manuring, tilling, fallowing, and sowing, that is to say, with corn, clover, and seeds, all such lands of his farm as, in the due course of husbandry used and approved of, required to be manured, tilled, fallowed, and sown as aforesaid; and had been accustomed, at his own expence, to find and provide all material and necessary things used and applied in and about such manuring, tilling, fallowing, and sowing. And, in case the tenant of such farm had quitted the same, without having received the benefit of such

manuring,

manuring, tilling, fallowing, and sowing as aforesaid, according to the due course of husbandry, in respect of such tenancy, and had not received, upon his entry on such farm, an equivalent benefit, without paying for the same, the landlord of such farm had, during all the time aforesaid, been accustomed, unless exempted therefrom by any special agreement, to make to such tenant as aforesaid (he having used and cultivated the farm according to the due course of husbandry) a reasonable compensation, in respect of such manuring, tilling, fallowing, and sowing as aforesaid, of which such tenant, at the time he so quitted such farm, had not, according to the due course of husbandry, in respect to such tenancy, received the benefit. And the Plaintiff then averred, that he continued tenant to the Defendant until the 1st of *May*, 1818, when the Plaintiff delivered up the possession of the farm; that, during his tenancy, the Plaintiff, not being restricted from so doing by any special agreement, did bestow his work, labour, care, diligence, and expence in the manuring, tilling, and fallowing divers, to wit, ten acres of the said land, and in sowing with clover divers, to wit, ten other acres of the said land, and in sowing with seeds divers, to wit, ten other acres of the said land, and in manuring divers, to wit, ten acres of the said meadow land; the said portions of land, in due course of husbandry there used and approved of, requiring respectively to be so manured, tilled, fallowed, and sown as aforesaid. And he further averred, that the Plaintiff, at the time he so quitted the said farm, had not received the benefit of such manuring, tilling, fallowing, and sowing made by the Plaintiff, according to the due course of husbandry, in respect of his tenancy. And, that the Plaintiff, upon his entering the said farm, did not receive any equivalent benefit, and, that, during his tenancy thereof, he cultivated the same according to the course of good husbandry; of

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all which premises the Defendant had notice, and there-upon, in consideration of the premises, the Defendant, not being exempt therefrom by any special agreement, undertook to make the Plaintiff a compensation in respect of such manuring, tilling, fallowing, and sowing, of which the Plaintiff at the time he quitted his farm, had not, according to the due course of husbandry, in respect of his tenancy, received the benefit; that a reasonable compensation in respect of such manuring, &c. amounting to 200*l.*, the Defendant became liable to pay the same. Second count, *quantum meruit* for manuring, tilling, fallowing, and converting five acres of the farm into grass land; and for manure made upon the land, and unspread thereon, at the time the Plaintiff quitted the farm; and for sowing twenty acres of land with wheat and clover, (which lands, in due course of husbandry, required to be manured, tilled, and fallowed,) and leaving the wheat and clover seeds growing thereon for the benefit of the Defendant. Third count, that the Plaintiff, having expended large sums of money, and bestowed labour in manuring, tilling, fallowing, &c., and being also possessed of large quantities of manure on the farm, the Defendant, in consideration of the premises, and that the Plaintiff would give up the farm on a day therein named, and the benefit of his work and labour, and would leave the manure thereon, promised to pay the Plaintiff so much money as *Edward Wilby* and *George Armitage* should ascertain and determine to be a due and proper sum of money for the same; that the Plaintiff relinquished the premises, and the benefit of his labour, &c. and left the manure thereon for the Defendant; and that *E. W.* and *G. A.* ascertained and determined that the Defendant should pay to the Plaintiff 140*l.* 14*s.* 2*d.* There were also counts for work and labour, and materials found; for crops of corn, turnips, and clover, and
divers

divers fallows, and quantities of tillage, and quantities of manure, goods and chattels bargained and sold by Plaintiff to Defendant, and the money counts; the Defendant pleaded the general issue, and paid 20*l.* into court upon all the counts, except the three first. At the trial before *Richards* C. B. at the *York Spring* assizes, 1819, several witnesses, on the part of the Plaintiff, spoke to the existence of the custom, and agreed in all material points. The first said, "The custom is, to allow the off-going tenant for what tillage he has left on the farm." The second, "The custom has always been, that two persons have been chosen to value over, and see what state the land was in, and if the tenant deserved any thing, he had it. These persons have valued what was in whole tillage, and in half tillage; if more grass was laid down than according to the common limits, the tenant was extra-paid for it: we reckon one-third grass the usual quantity: seeds are valued, and manure, when there is any." A third, "In general, there is no allowance for manure laid upon the meadow, sometimes there is." A fourth, "The custom is, to value lime and improvements." The Defendant's first witness, a land valuer, said, "he had never heard much of this custom, if there were such a one." The second, "I know there has been a practice in the neighbourhood of valuing, but I understand it was always by agreement: I cannot say there is no such custom without agreement." A third, "I suppose there is such a custom on the east side of *Halifax*." The valuation made for the Plaintiff was 140*l.* 14*s.* 2*d.*, being for tillage, half tillage, wheat sown, seeds and grass sown, and manure left on the premises. The counsel for the Defendant objected, first, that the custom, as laid in the declaration, was not proved; secondly, that it was not a custom in point of law; that it was not a custom from time

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time immemorial; that it was unreasonable; and that no evidence whatever had been given of the custom of the country. These objections were over-ruled by the Lord Chief Baron, who observed, that this was not to be treated (strictly speaking) as a custom, but as an usage or general practice of the country where the lands lie, and that he thought the usage not unreasonable. In summing up, he said, that he thought the usage and claim, as laid in the declaration, had been fully made out, and that the case was rather strengthened, than not, by the witnesses for the Defendant. The jury found a verdict for the Defendant, damages 122*l.* 15*s.*

Cross Serjt., on a former day, had obtained a rule *nisi* to stay the entry of the judgment, or to set aside the verdict and have a new trial, or to reduce the damages to the particulars, which form the subject of the first count of the declaration.

Hullock Serjt. now shewed cause, and addressed himself, first, to that part of the rule, which went in arrest of judgment. It had been objected by the Defendant, when he obtained his rule, first, that the first count of the declaration did not contain an averment that the farm consisted of arable and meadow land; secondly, that the count did not aver that the Plaintiff had tilled all lands requiring to be tilled, but only some of them; and, therefore, that the count was defective. But these objections were answered by the count itself; and, even if they were not, the verdict had cured the defect, if any. The declaration, after stating the manuring, tilling, and fallowing, according to the due course of husbandry, and the custom of the country where the premises lie, contains averments falling, precisely, within the terms of the custom: it then avers the sowing with wheat of a certain number of acres of the lands, and those lands,

when sown, must be arable; wheat can only be sown on arable land, therefore, when the sowing of a certain number of acres with wheat is averred, *ex necessitate rei*, those acres are averred to be arable land. The count then proceeds, "and in manuring divers, to wit, ten acres of the said meadow land." So that it is clear, from the count itself, that the farm necessarily did contain arable and meadow land. It is next objected, that it is not averred, that all the lands, which required tillage, were tilled and manured; but the count speaks of "the said portions of land in due course of husbandry there used and approved of, requiring respectively to be so manured, tilled, fallowed, and sown as aforesaid." This objection also, is, therefore, answered by the count itself; and, if all the lands, which required to be manured, and tilled, were not so tilled, that should have been given in evidence by the Defendant, and no such evidence was given. But, even if this objection to the count were well founded, there is this further answer, that the defect is now cured; for, where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal ground of objection on demurrer, yet, if the issue joined be such as necessarily requires, that, on the trial, the facts, so defectively or imperfectly stated or omitted, shall be proved; and, if it cannot be presumed, that, without such proof, either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law. *Spieres v. Parker.* (a) *Rushton v. Aspinall.* (b) *Collins v. Gibbs.* (c) *Skinner v. Gunton and Others.* (d) In this last case, the defect cured by the verdict was infinitely

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(a) 1 T.R. 145., *verba Buller J.*
(b) Dougl. 683., *verba Lord*
Mansfield C. J.

(c) 2 Burr. 899.
(d) 1 Saund. 228.

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stronger than that urged by the defendant in this case (a). The next objection urged by the Defendant is, that, admitting the count to be right, yet the custom averred in that count is unreasonable and uncertain, and, therefore, bad in point of law. If the Defendant means that the custom is not laid as a legal custom, the Plaintiff admits that it is not; for, this is a common usage in the neighbourhood, and not a custom immemorial from the time of *Richard the First*. In *Legh v. Hewitt* (b), Lord *Ellenborough* says, "The jury have found a verdict for the Defendant, under an impression, that the words in the declaration, '*according to the custom of the country*,' required a more strict and specific proof, in respect of the relative quantity of land allowed to be annually in tillage, than I think they demanded. The words are, that the Defendant promised 'to use and occupy the premises in a good and husbandlike manner, according to the custom of the country where the said premises lie;' by which I understand the parties to have meant no more than this, that the tenant should conform to the prevalent usage of the country where the lands lie. From the subject matter of the contract, it is evident that the word '*custom*,' as here used, cannot mean a custom in the strict legal signification of the word, for, that must be taken with reference to some defined limit or space, which is essential to every custom properly so called. But no particular place is here assigned to it, nor is it capable, here, of being so applied. What shall be considered in farming as a good and husbandlike manner, must vary exceedingly according to soil, climate, and situation; and, therefore, the custom of the country, with reference to good husbandry, must be applied to the ap-

(a) See all the cases, relative to defects cured by verdict, collected in Serjt. *Williams's* note to *Stennel v. Stagg*, 1 *Saund.* 228. n. 1.

(b) 4 *East*, 154.

proved

proved habits of husbandry in the neighbourhood, under circumstances of the like nature." The words of the other judges are equally strong, and this case is sufficient to defeat the objection, that the custom is not laid as a custom from the time whereof, &c. All cases for mismanagement are determined on the same ground as the present, viz. the mere existing usage of the neighbourhood. It is then said, that the custom is unreasonable; but what can be more beneficial both to landlord and tenant? The tenant is induced thereby, to till the land, during the last year of his tenure, as if he were going to stay on the farm, and, not to till that part of the farm only, which would give him his way-going crop. The custom is then more especially beneficial to the landlord. If the tenant mismanages the farm, an action lies against him, and, if he well tills the land, he ought to be reimbursed for the labour, which he has expended thereon, and that is virtually the custom upon this record. Nor is this case new; for this very custom has received the sanction of the Courts in the cases of *Senior v. Armitage* (a), and also of *Coleman v. Harvey* (b). In *Wigglesworth v. Dallison* (c), Lord Mansfield C. J. says, "he who sows ought to reap." The custom is also supported by *Bevan v. Delahaye* (d). As to that part of the rule, which prays for a new trial, there is not the slightest pretence for it, for, all the evidence was one way. Then, as to the reduction of damages, money has been paid into court; and, if it was not paid in on the first count, it was the Defendant's own laches. The charge for excess of meadow land falls within the first count.

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Cross Serjt., in support of the rule, having read the evidence as given at the trial, contended, first, that,

(a) 1 Holt, 197.

(c) Doug. 207.

(b) Tried at York, coram

(d) 1 H. Bl. 5.

Roake J. 1813.

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whether taken separately or collectively, it did not establish the custom, as laid in the first count of the declaration. Then, as to the declaration itself, the Defendant is there stated to have promised in consideration of the premises. The premises contain an alleged custom, and the allegation is, not, that he undertook to pay the Plaintiff according to the custom, but, that, in consideration of the custom he undertook. This is no sufficient consideration. And, here, a distinction must be made between a custom which is the *lex loci*, and binding, and an usage, which is not binding of itself. Custom creates a legal title, usage is only evidence of title; and it must be shewn that the party knew the usage. This distinction was observed in *Wigglesworth v. Dallison*, and *Legh v. Hewitt*: the former was a case of custom, the latter of usage. In the present case, if the Plaintiff had alleged that the Defendant undertook to act according to a certain usage, and had then proved the usage, there could have been no objection. He does not allege this, but merely, that in consideration that other landlords in the country act according to the usage, the Defendant promised to do so too; and this is no consideration for such a promise. Had he even stated, that it was the Defendant's duty to do so, that might have altered the case; but there is no count containing such statement. Next, the usage itself, if established, is bad. It would go to an enormous length, namely, that any tenant, (for the declaration contains no limitation of the word tenant,) whether in tail, for life, or years, is entitled to a pecuniary compensation for all tillage, of which he has not received the benefit; so that it would be impossible for landlord and tenant to part without a dispute. A tenant for life is already entitled to emblements; but, by this custom, he could have the payment for his tillage also. In this case, the Plaintiff had been tenant eighteen years, during which time, he had had three different landlords:

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the compensation on quitting is not to be paid, if the tenant receives an equivalent on entry; and how is the Defendant, who has been the landlord only for the last three years, to inquire or ascertain what equivalent the tenant received eighteen years ago? [*Per Cur.* Whatever is sufficient to put the party upon inquiry is equivalent to notice.] This usage is also unreasonable and uncertain. Can it be right, that a tenant for life or in tail (for the word tenant is put generally) should have a compensation for all unexpended manure, when he is also entitled to emblements? Besides, this alleged local usage is not founded on any local fact; the tenant does no more in this district, nor is he otherwise circumstanced than tenants in other districts; and yet the landlords, here, are required to do more than other landlords. Another uncertain allegation is, that the tenant shall have a compensation for his manure whenever he quits. According to this allegation, he is entitled to the compensation, as well when he runs away, after committing waste, as when he quits on the expiration of his term. In order to render the custom reasonable, it ought to have been stated, that the tenant was entitled, on quitting at the expiration of the term. [*Per Cur.* It is substantially so alleged.] There is no precedent of a successful action on a usage such as this. In *Senior v. Armitage* a new trial was ordered, but the Plaintiff never went down a second time. [*Per Cur.* The objection in that case was not to the custom, but to the evidence.] The declaration is, also, ill, because it does not allege, that the tenant quitted at the expiration of his term (a).

Cur. adv. vult.

(a) The declaration in the case of *Senior v. Armitage* being produced, it appeared that it contained an averment, that the Plaintiff quitted at the lawful termination of his term.

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DALLAS C. J. now delivered the judgment of the Court. A motion has been made in this cause for a new trial; and in case the Court should be of opinion, that a new trial ought not to be granted, then the Defendant contends, that three sums ought to be deducted from the damages, and has also moved in arrest of judgment. The action is of assumpsit. The declaration states, that on the 2d May, 1800, the Plaintiff became tenant to *Samuel Elam*, of a farm containing divers acres of lands, with the appurtenances, of which the reversion belonged to the said *Samuel Elam*; that the Plaintiff continued such tenant till the reversion came to and vested in *Joseph Hirst* by assignment; that the Plaintiff then became tenant to the said *Joseph Hirst*, and so continued till his death, when the reversion came to and vested in the Defendant; and then Plaintiff became his tenant. The declaration then states, that according to the due course of husbandry used and approved of in the country where the premises lie, the tenant of every farm containing arable and meadow lands, not being restricted from so doing by any special agreement, hath been used and accustomed, from time to time during his tenancy, to bestow his work and labour, care, diligence, and expence, in and about the manuring, tilling, fallowing, and sowing, (that is to say,) with corn, clover, and seeds, all such lands of his said farm, as, in the due course of husbandry, used and approved of, required to be manured, tilled, fallowed, and sown as aforesaid, and hath been used and accustomed, at his own expence, to find and provide all materials and necessary things used and approved in and about such manuring, tilling, fallowing, and sowing as aforesaid; and, in case the tenant of such farms has quitted the same without having received the benefit of such manuring, tilling, fallowing, and sowing as aforesaid, according to the due course of husbandry, in respect of such tenancy, and has not received upon his entry

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entry on such farm an equivalent benefit, without paying for the same, the landlord of the said farm has, during all the time aforesaid, been used and accustomed, unless exempted therefrom by any special agreement, to make to such tenant as aforesaid, he having cultivated such farm according to the due course of husbandry, a reasonable compensation in respect of such manuring, tilling, fallowing, and sowing as aforesaid, of which such tenant, at the time he quitted the said farm, had not, according to the due course of husbandry in respect of such tenancy, received the benefit. The Plaintiff then says, he continued tenant of the said farm, to wit, of the lands thereof, to the 2d *February*, 1818, and of the buildings to the 1st of *May* in the said last year; on such days respectively he quitted, and delivered possession; that, during such tenancy, viz. on the 1st *February*, 1815, and on divers other days and times between that day and quitting and delivering up, not being restricted by any agreement, he did bestow his work and labour, care, diligence, and expence in and about the manuring, tilling, and fallowing, divers, to wit, ten acres of the said land, and in tilling and sowing with wheat divers, to wit, ten acres of the said land, and in sowing with clover divers, to wit, ten other acres, and in sowing with seeds divers, to wit, ten other acres, and in manuring divers, to wit, ten acres of said meadow, the said portions, in due course of husbandry there used and approved of, requiring respectively to be so manured, tilled, fallowed, and sown as aforesaid; and then avers, that he had not received any equivalent benefit, and that during his tenancy, he cultivated the same, according to the due course of husbandry, of which the Defendant had notice. And thereupon, in consideration of the premises, the Defendant, not being exempt therefrom by any special agreement, undertook to make him such reasonable compensation in respect of such manuring, tilling, fallowing,

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lowing, and sowing as aforesaid, of which Plaintiff had not, in due course of husbandry, received the benefit. And Plaintiff avers, that he had not received such benefit, and that a reasonable compensation therefore, amounted to a large sum of money, to wit, 200*l.*, of which Defendant had notice. There are two other special counts, and, also, common counts in the declaration. The general issue was pleaded to this declaration, and the Plaintiff has obtained a verdict of 122*l.* 15*s.* The case was tried before the Lord Chief Baron, at the last assizes for the county of *York*. His Lordship has stated the evidence in his report, and it appears that the jury were well warranted in finding a verdict for the Plaintiff. The custom or usage appears to have been satisfactorily proved. If the jury had deemed it to be unreasonable, they ought to have found for the Defendant. We are satisfied there was no good ground for contending before the jury, that the custom, or rather usage, was unreasonable. It affords the strongest encouragement to good husbandry of farms; it is beneficial to landlords and tenants also; the land of the former receiving a lasting benefit from the labour and expence bestowed by the tenant, on payment of a reasonable compensation; and the latter being thereby encouraged to pursue a good course of husbandry, by the assurance which he has, that if his continuance on the farm should not enable him to reap the full benefit of what he has done, he will have a right to call on his landlord for proportionate compensation. We think there is no ground whatever for disturbing the verdict, which appears to have been to the satisfaction of the Lord Chief Baron, otherwise than by reducing the damages to 100*l.* 5*s.*, by deducting the sum of 22*l.* 10*s.*, including therein a deduction for grass-land, which the Plaintiff did not enter upon. The rule, therefore, must be absolute to that extent, and discharged as to the new trial. There is

also

also a motion in arrest of judgment, founded on alleged defects in the first count of the declaration. First, It is alleged, that the count must aver that the custom or usage is reasonable. We think the custom reasonable, on the face of the declaration, for the causes before stated, and that the facts and circumstances stated in the declaration form a good consideration for the Defendant's promise. Secondly, It has been contended, that the custom is bad, inasmuch as it states, that the tenant of every farm, containing arable and meadow lands, is entitled to this compensation; and it is urged, that this may apply to others than mere tenants for years, and that it is uncertain. We think that the words "tenant of every farm containing arable and meadow land, not being restricted from so doing by any agreement," exclude such an idea, and with sufficient certainty shew, that it is applicable only to tenants of farms in the ordinary sense, and that, according to the common acceptance of the term, it applies only to persons occupying as husbandry tenants. Thirdly, It has been urged, that the declaration is substantially defective in this, that the custom and usage is "for every tenant of every farm containing arable and meadow lands," &c., and that it is not averred, that the Plaintiff's farm contained arable land. It certainly is not so averred in express words, but, in effect, it is so stated; for the Plaintiff by his declaration claims a compensation for work and labour, care, diligence, and expences in manuring, tilling, and fallowing divers acres of land, in tilling and sowing other lands with wheat, and in sowing with seeds divers other acres, parts of the farm of which he was tenant. There is then, in effect, a statement that the lands were arable lands; and, at the utmost, it is only a defective or inaccurate statement of part of the ground or title of action. On this motion we must hold, that the Plaintiff at the trial proved that

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these lands were arable, because, without doing so, he could not have obtained a verdict. In the case cited by my Brother *Hullock* of *Rushton v. Aspinall* (a), Lord *Mansfield* lays down the rule to be, that, "where the Plaintiff has stated his title or ground of action defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after verdict, that they were proved; but that, where the Plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption." In the present case the Plaintiff must have proved that he manured, tilled, fallowed, and sowed the lands as alleged in the declaration; and by this it must have been proved, that the lands were arable. The rule, as far as it relates to arresting the judgment, must, therefore, be discharged.

(a) *Doug.* 658.

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When a party takes an assignment of lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied, or become possessed, in fact.

COVENANT. The declaration stated, that the Plaintiff, by indenture of 1st November, 1808, demised to *W. Marsham* certain tenements, to hold to *W. Marsham* and his assigns from 29th September then last past, for the term of eleven years wanting twenty-one days, yielding to the Plaintiff the clear yearly rent of 150*l.*, payable quarterly by equal portions; that *W. Marsham* covenanted for himself and his assigns for the payment of the rent during his term, and that by virtue of that indenture he entered and was possessed; that all the estate and interest of *W. Marsham* in the premises

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afterwards became vested, by assignment, in the Defendants, who, thereupon, entered and became possessed; and that on the 24th of *June*, 1813, 150*l.* became due for a year's rent of the premises, and continued unpaid, and so the Defendants had refused to keep the covenant so made by *W. Marsham* for himself and his assigns. The Defendants pleaded, that all the right, title, interest, term and terms of years then to come and unexpired, property, profit, claim, and demand whatsoever of *W. Marsham*, of, in, and to the premises, by assignment thereof legally made, did not come to, and vest in, the Defendants in manner alleged. A special verdict found, that after the making of the lease, and during the term, by indenture of 18th *July*, 1812, between *W. Marsham* of the one part, and *Beachcroft*, since deceased, and the Defendants, of the other part, under the hand and seal of, and duly executed by, *W. Marsham*, [reciting an indenture of lease, of 1st *September*, 1807, between *H. Thompson* and *W. Marsham*, whereby *H. Thompson* demised to *W. Marsham* a certain messuage and land, for the term, and at the rent, and subject to the covenants therein mentioned; and also reciting the lease in the declaration mentioned; and also reciting two bonds, whereby *W. Marsham* became bound with *T. Marsham* to one of the Defendants and *Beachcroft*, since deceased, in 3000*l.*, conditioned for payment of 1500*l.* with interest, and in 2000*l.* conditioned for the payment of 1000*l.* with interest; and that 2500*l.* was then due from *W. Marsham* to the Defendants and *Beachcroft*; and that for the better securing the repayment thereof and interest, *W. Marsham* had agreed with the Defendants and *Beachcroft* to assign to them the said in part recited lease, and all the said messuages, lands, and hereditaments, and all *W. Marsham*'s estate, right, and interest in those leases]. It was witnessed, to the tenor and effect following, namely, that in consideration of the

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sum of 2500*l.* due from *T. and W. Marsham*, on their bonds, to the Defendants and *Beachcroft*, and of 5*s.* paid by the Defendants to *W. Marsham*, *W. Marsham* thereby bargained, sold, assigned, transferred, and set over to the said Defendants and *Beachcroft*, their executors, administrators, and assigns, as well the said indentures of lease, as all the premises thereby demised to *W. Marsham* and his assigns; and also, all the estate, right, title, and interest, term and terms of years then to come and unexpired, trust, property, benefit, claim, and demand, whatsoever, both at law and in equity, of him *W. Marsham*, of, in, to, or out of the premises, to hold to the Defendants and *Beachcroft* and their assigns, for the residue of the term then unexpired in the same, in as large, ample, and beneficial a manner, to all intents and purposes, as *W. Marsham* could have enjoyed the same, together with the indentures of lease, subject to the rents and covenants reserved by the lease; and, also, subject to the proviso and agreement for redemption of the premises thereafter mentioned. Provided, that if *W. Marsham* should pay the Defendants and *Beachcroft* 2500*l.* with interest, on 18th *July* then next, with out deduction, then the Defendants and *Beachcroft* should, upon the request of *W. Marsham*, his executors, administrators, or assigns, re-convey and re-assign the premises to him, his executors, administrators, or assigns. Then followed covenants from *W. Marsham* to pay the 2500*l.*, that the lease was a valid lease, and that he had a right to convey: with a proviso, that if the 2500*l.* remained unpaid, the Defendants and *Beachcroft* might enter into, hold, and occupy the premises to their own use, for the remainder of the term, free of all charges and incumbrances made by *W. Marsham*, or any claiming under him. Then followed a covenant for further assurance, in default of payment; and an agreement that, until default, *W. Marsham* might occupy the

premises, without disturbance by *Beachcroft* and the Defendants. The special verdict further stated, that the said last-mentioned indenture was, immediately after its execution by *W. Marsham*, delivered to the Defendants and *Beachcroft*, who accepted the same; that, at the time of the delivery thereof, *W. Marsham* was indebted to the Defendants and *Beachcroft*, as therein was mentioned, and did not pay them the 2500*l.* and interest specified, at the time and place and in manner appointed, and that the same remained unpaid at the commencement of the suit; and that the Defendants and *Beachcroft* did not, nor did any of them, at any time, actually enter into, or become possessed of, the demised premises. But whether, upon the whole matter, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand whatsoever of *W. Marsham*, in the demised premises, by assignment legally made, did vest in the Defendants and *Beachcroft*, the jury were ignorant: if it did, they found for the Plaintiff; if not, for the Defendant.

This special verdict was argued in *Hilary* term, 1819, at *Serjeants' Inn Hall*, before ten Judges, (*Best J.*, who had formerly argued the cause on demurrer in the Common Pleas, and *Richardson J.*, being absent,) by *Vaughan Serjt.* for the Plaintiff, and *Bosanquet Serjt.* for the Defendant.

Vaughan Serjt., for the Plaintiff. The question is, whether, when an assignment of a lease is made by way of mortgage security, and the assignee never enters, he can be liable to the covenant for the payment of rent. Lord *Coke* says, long terms of years were not known to the common law (a), *Blackstone* says the same thing (b), but they both add that this law was antiquated, and, in

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(a) *Co. Lit.* 45. b. 45. a.

(b) 2 *Bl. Comm.* c. 9. p. 142.

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Madox (a), there are many instances of demises for long terms, probably, therefore, they were not unknown: but, until stat. 21 H. 3. c. 15. they were the most infirm interests which a party could have, for, a lessor, by colluding with a third person, could always oust the termor; but that statute enacted, that feigned recoveries should not avail against him. The question, however, in the present case, turns on the legal effect of an assignment. An assignment alone, if made with the assent of the assignee, and accepted by him, creates such a privity of estate, that, *eo instanti*, on the execution of the deed, the estate vests in him, and he becomes liable to all the same burthens and covenants as the lessee. Whether the assignment be absolute or conditional, there is no substantial difference between the two cases. With regard, indeed, to estates less than freehold, *Blackstone* conceives (b) actual entry to be an essential part of the contract, and, that, previously to entry, no estate vests, but a mere naked right of entry, the *interesse termini* (c): but he lays down this much too broadly, for, it seems, that any thing, which manifests the assent of the party, whether execution of a lease or any other act, equally vests the land in him, and he becomes tenant for all purposes, except for that of bringing an action of trespass, which, it is true, he cannot maintain, until actual entry. The only reason why acceptance is necessary is, because, otherwise, a party might be saddled with a lease more burthensome than beneficial; and, thus, the king, or a corporation, cannot compel a man to take a grant *in invitum*. After a lease and before entry, the release of the lessor only extinguishes the rent, and does not operate to enlarge the estate (d); it is, therefore, to that extent, an estate of privity, and,

(a) *Formulare Anglican.* No. 239. fol. 140. 21 R. 2. *Ib.* No. 245. fol. 146. A. D. 1429. *Ib.* (b) 2 Bl. Comm. c. 9. p. 140. (c) 2 Bl. Comm. c. 9. p. 144. (d) Co. Litt. 270 a. No. 248. fol. 148. 7 Edw. 4.

if the lessor die the moment after execution, that does not avoid the lease. The interest of the lessee, after lease executed, may be barred by a fine (a). So, a lessee, after lease executed, has his rights so far perfected, that they will descend to his executor (b). *Coke* lays it down, that if a man makes a lease for years, the lessee, before entry, has an estate for years in the land which he may grant (c). This is very different from the position laid down by *Blackstone*. It cannot, therefore, be contended that the lessee hath but a naked right; for he may grant his interest over, though he cannot take by release to enlarge his estate (d). There is a material distinction between the legal and actual possession: there is also a distinction between *interesse termini*, in the sense of a future interest, and in the sense of an immediate interest (e). But, if the lessee hath this interest, which may be transferred completely from *A.* to *B.*, and from *B.* to *C.*, without entry; surely the whole estate passes by assignment. According to *Sheppard's Touchstone* (f), a lease for 1000 years is perfect by the delivery of the deed, without any actual possession; therefore, as between lessor and lessee, the interest completely passes: and, if between them, then the perfect interest passes to an assignee by the execution of an assignment; and there is this only difference, that the privity of estate alone is transferred, not the privity of contract: but, the transfer once made, the land *transit cum onere*. An assignee may bring ejectment (g), or *quare ejecit infra terminum* (h). In *Eaton v. Jaques* (i), it is true, *Buller J.* holds, that, even if the assignment were absolute, the assignee would

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(a) *Saffyn's Case*, 5 Rep. 124. (e) *Co. Lit.* 345. b.

(b) *Cro. Jac.* 61. *Saffyn v. Adams.* (f) 211.

(c) *Co. Lit.* 270. b.


(g) *F. N. B.* 198. D.

(d) *Saffyn's case*, 5 Rep. 124.

(h) *Com. Dig. Quar. ej. (A.)*

(i) *Doug.* 444.

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not be liable; but how can this consist with the doctrine, that the assignee may have the benefit of an ejectment? [Holroyd J. In the old action *quare ejecit infra terminum*, the assignee must have entered, and sealed a lease on the land, for the purpose of his action; and, in so doing, he perfected his estate. In the modern action of ejectment, the confession of lease, entry and ouster precludes the necessity of this.] The Court must now make an election between *Eaton v. Jaques* and *Walker v. Reeves (a)*. In *Eaton v. Jaques*, which certainly is the same with the present case, namely, that of a mortgage security, Buller J. holds, that even if the assignment were absolute, covenant lies not against an assignee; but none of the Judges are supported in the doctrine advanced in that case by the authorities cited. A court of law cannot look to the equitable rights of the parties. The form of pleading, in *Cook v. Harris (b)*, is material to shew, that, if there be an acceptance of the assignment, it is equivalent to actual entry. That case was debt against the assignee of a term, executor of the first lessee, for rent; plea, that before the rent became due, she assigned, on 1st July, all her estate to A. B., who accepted the assignment (not that he entered and became possessed, as usual). The replication was fraud. An exception was taken to the plea, because it appeared that the Defendant assigned, before the term was assigned to her by the assignment, of which the Plaintiff declares, and she did not say that she assigned after; and it was urged, that it was possible there might have been a re-assignment on the 1st July. Holt C. J. said, "This plea ought to have said, *post assignationem*, and, therefore, if the Plaintiff had not replied, this plea had been ill; but, here, the Plaintiff hath aided it by his replication." He also said, "the ancient method of pleading assignments

(a) Doug. 461. n.

(b) *Ld. Raym.* 367.

was, *virtute cuius* the assignee entered and was possessed ; but that is disused now, for, the assignee has the estate in him before entry, though not to bring trespass." This case shews that it was not, then, held necessary to aver *virtute cuius* he entered and became possessed ; but that averment of acceptance was equivalent. There would be no need of a *virtute cuius*, if it were an averment of the fact of entry ; but it is a mere averment of a consequence of law, and there are abundance of authorities to shew that *virtute cuius*, *prætestu cuius*, and *per quod*, are not traversable, but mere inferences of law (a). If *virtute cuius* be traversable, then the effect of the statute of uses is traversable. The case of *Walker v. Reeves*, on which the Plaintiff relies, is a later authority than the case of *Eaton v. Jaques* ; and though the lessee, after his assignment, is liable on his own contract (b), yet the title and possessory right pass ; and the assignee, being so possessed, becomes also liable, [*Bayley J. Walker v. Reeves* has been materially impeached by *Turner v. Richardson* (c).] In *Turner v. Richardson*, the court abstain from touching this question ; and *Copeland v. Stevens* (d) is consistent with *Walker v. Reeves*. *Copeland v. Stevens* decides, that the assignment of a bankrupt's estate does not bind his assignees to a lease, without assent by them. There is a difference between assignees in law and assignees in fact ; the assignees of bankrupts are only assignees in law, and can never be bound unless they have manifested their election to take ; and the mere putting up an estate to auction was held, in *Turner v. Richardson*, not to constitute a sufficient assent. The case of *Eaton v. Jaques* has never been ap-

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(a) *Priddle & Napper's case*, Salk. 209. S. C. 1 *Ld. Raym.*
11 Rep. 10. *Beal v. Simpson*, 170.

Ld. Raym. 412.

(c) 7 East, 335.

(b) *Bellasis v. Burbrick*, 1 (d) 1 Barn. & Ald. 593.

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proved of; and Lord *Kenyon*, from his first coming to the bench, always went out of his way to seek occasions of declaring his dissent from it. In *Dale v. Westerdell*, his Lordship says, that in charging a mortgagee, it is not necessary to aver that he entered and was (a) possessed. *Stone v. Evans* (b) was decided on the same principle. *Gibbs*, then of counsel in the cause, there offered proof that no possession was taken. Lord *Kenyon* said, whether possession was taken or not made no difference; and when *Gibbs* cited *Eaton v. Jaques*, his Lordship said he would overrule it without the least reluctance. [*Burrough J.* (reading a note of the case) Lord *Kenyon* said, by assignment of the whole estate, all liabilities accrue; and persons who act with caution always take a mortgage for a term one day short of the original lease.] There are several cases in equity which shew that the Chancellors have always considered, that at law, all the covenants attach on assignees. *Sparkes v. Smith*. (c) *Pilkington v. Shaller* (d). *Lucas v. Comerford* (e). In the last case, Lord *Thurlow* says, "Whether the Defendant took it (*i.e.* the lease) as a pledge or a purchase, he cannot take the estate without the burthen;" and he compelled the depositary to execute the assignment, and to pay the costs.

Bosanquet Serjt., for the Defendant. It is admitted, that *Eaton and Jaques*, if it can be maintained, rules this case in every point. It must, therefore, be shewn that *Eaton v. Jaques* is not consonant to the principles of common law, or, that it is not applicable to this case. This is a covenant against an assignee, founded on privity of estate; and the Defendant agrees in the principle *qui sentit commodum, debet et onus sentire*, but not unless he

(a) 7 T.R. 312.

(c) 2 Vern. 275.

(b) *Woodfall's L. & T. c. 3.*(d) *Ibid.* 374.

s. 15.

(e) 1 Ves. jun. 235.

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have the whole benefit. It is laid down in early cases, that debt lies against the assignee of the entire interest in a term (a), but not against one who takes less than the entire interest; and what is the issue here? Not, whether the Defendant have an interest, or have a right to have it conveyed to him; but, whether all the estate, right, title, interest, property, claim, and demand, of *W. Marsham*, legally vested in him. [Abbott C. J. Surely, if all the legal estate vested in him, although another have an equitable claim, it will not vary the case.] The legal claim alone, and not the equitable, is at issue here; but all that the lessor gets out of the assignee is *hæc apponendum*, for his original contract is with the lessee. In *Brown's Entries* (b), the form of declaring is, and this in the reign of *Elizabeth*, *concessit et assignavit tota, statum, titulum, interesse et terminum annorum*, which he then had in the premises; not *clameum et demandum*; the others are the important words. Whatever may be the case as to immediate lessees, the assignee of tenant for years can never be possessed by operation of the statute of uses, because the tenant for years has no seisin of the freehold to serve the use, and therefore this is a case to be considered wholly at common law; and, by the common law, an estate can only be perfected by possession. Estates at common law lie either in livery or in grant; those which lie in grant will not pass by livery, or without deed; those which lie in livery, will not pass without livery. Thus, a grant of a rent-charge, which lies in grant, is destroyed by cancelling the deed (c): but where an estate for years passes by deed, that estate lying in livery, and not in grant, the estate is not destroyed by cancelling the deed. Since the statute of frauds, we see no conveyances save those in writing; but before

(a) 5 Hen. 7. 19. a.

(b) 132.

(c) Co. Litt. 308. b.

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that statute, terms for years passed by parol, and were assigned by parol; and it was held (a) that an assignee by parol should have his action of covenant. It cannot therefore be controverted, that leases for years lie in livery, and not in grant. *Bracton* (b) lays this down broadly, *Donationum, secundum quod prædictum est, alia perfecta, alia imperfecta; nunquam erit perfecta donatio, donec donatorius plenam habuerit possessionem sive seisinam*. *Bacon's Abridgment*, in the article on leases, is a high authority on this subject, that article having been written by Lord C. B. *Gilbert*. One section of that treatise (c) is employed to shew in what respects entry by lessee is requisite to the perfection of his lease. At common law, no lease for years was looked upon to be complete till actual entry by the lessee; and, therefore, if a lessor released to the lessee before entry, the reversion would not pass, because the lessee had not possession. Yet it is urged on the other side, that possession is an inference and conclusion of law resulting from the deed. This position, C. B. *Gilbert*, *Coke*, and *Bracton*, contradict; and this execution of leases by entry was necessary till the statute of uses, since which, another mode of transferring uses into possession has been introduced. In *Bacon's Abridgment*, tit. *Leases*, P., it is said, "If one make a lease for years, to commence two years hence, he may transfer it to another, who may, by entry, reduce it into possession when he thinks fit." *Littleton* says (d), "Tenant for term of years, is where a man letteth to another for such term of years as is accorded between lessor and lessee; and, when the lessee *entereth* by force of the lease, then is he tenant for term of years." *Coke's* commentary on this is, "And, true it is, to many pur-

(a) *Cro. El.* 373. 436. *Noke v. Auder.*

(b) *Lib. 2. c. 17. s. 1.*

(c) *Bac. Ab. Leases, M.*

(d) *S. 18.*

poses he is not tenant for years until he enter (a).” The language of *Littleton’s* 66th section is to the same effect; and is the more remarkable, because it is particularly adverted to, and completely recognized by Lord *Ellenborough*, in *Copeland v. Stevens*. Again, in section 459., it is said, that a lease is void, where the lessee had not possession in the land; because he has no estate in the land, but only a right to have the land by force of the lease. Nothing can be stronger than the passage in *Co. Litt.* 270. a., which completely bears out *Blackstone* (b), in the doctrine, that a bare lease gives the lessee only a right to enter, called *interesse termini*; and, when he enters, and not before, he is complete tenant for years. Lord *Ellenborough* lays down, in *Copeland v. Stevens*, the principles of the common law which govern this case. The estate in the land, and the right to have the land, are matters distinct; and the action of covenant is founded on privity of estate, not on privity of right, if there be any such thing. [Abbott C. J. I can say, as one of the judges who decided that case, that I did not intend to give any judgment which would at all affect the case now before the Court.] There is one remarkable case, in which, though on a freehold interest, livery of seisin is dispensed with, and yet the estate is never perfected till entry; that is, in the case of an exchange. *Littleton* says (c), each may enter into the other’s land, without livery of seisin. *Coke’s* commentary is, that the parties have no freehold, in deed or in law, till entry. In the present case, it is found that an assignment is executed by *Marshall* to the Defendants: there is no finding that the Defendants ever executed a counterpart, but simply that the indenture was delivered to them, and that they accepted the same. As to the authorities previous to *Eaton v. Jaques*, it appears that

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(a) *Co. Litt.* 46. b. (b) 2 *Bl. Com.* 314. (c) *S.* 62.

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possession was necessary to subject the assignees to an action: there is an averment of entry and possession, as ancient as the time of *Elizabeth*. But then, it is said, that this is an inference of law: the *virtute cuius, prætertu cuius*, or *per quod*, is perhaps an averment of matter of law, and not traversable; but this expression of *intravit*, he entered, is a matter of fact, not a conclusion of law. There are two or three most important cases with respect to the liability of executors; and the principle contained in them is, that an executor, as executor, is liable to be sued in respect of the lease of his testator, whether he enter or not; and, whether the estate will produce the rent or no, he is liable to the extent of the value of the land, and all his other assets. But he is not liable, as assignee, unless he enter; and, if he enter, he is liable as assignee. If he *continue* in possession, he shall be charged in the *debet* and *detinet*, whether he has assets or not (a). In *Bellasis v. Burbrick* (b), it is said that *lessee* is liable by his contract, whether he occupy or not; but this cannot apply to the case of assignee. In the case of *Cook v. Harris* (c), *Holt* manifestly founds his conclusion on the pleadings. He admits what was the ancient form of pleading, and alleges that it is disused. But *Buller J.*, than whom none had a more perfect knowledge of pleading, says (d), *Holt* is mistaken; and the course of pleading now, and from the time of *Elizabeth*, is the same as it was then. In *Huckle v. Wye* (e), it was objected, that no action lay against an assignee after several mesne assignments,

(a) *Buckley v. Pirk*, 1 Salk. 79. 316. *Billinghurst v. Speer-*
man, 1 Salk. 297. *Helier v.*
Casebert, 1 Lev. 127.

(b) *Ld. Raym.* 171. 1 Salk.
209.

(c) 1 *Ld. Raym.* 367.
(d) *Eaton v. Jaques.*
(e) *Cartbeu*, 255.


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because it was not shewn he was assignee of the term of the first lessee; for, the same tenements might come to him by assignment of another estate in the tenements, and not the same estate that the first lessee had. [Abbott C.J. You infer the necessity of the averment of entry and possession, from its general recurrence in all actions of covenant by lessor against assignee; is not the inference weakened by observing, that the same averment usually occurs in covenant by the lessor against the lessee, where it certainly is not necessary?] It certainly weakens the inference, *pro tanto*; but it is decided in *Eaton v. Jaques*, that, if the assignee is not in possession of the whole so as to have the benefit of the whole, he is not liable. The utmost inference to be drawn from the case of *Sparkes v. Smith*, which was considered in *Eaton v. Jaques*, is, that the counsel thought it fit to make the application, and the Chancellor left him to recover at law as well as he could. As to *Pillington v. Shaller*, it is unfortunate that the only report of a common law decision should be found in the recital of a case in equity; but Lord Mansfield, who well understood equity, says that case is contrary to the constant practice of a court of equity (a). In *Lucas v. Comerford*, Lord Thurlow sends the parties to a court of law, saying, "I will compel the party to take an assignment, and then you may try what you can do at law;" not deciding that he has any relief at law. As to the authority at common law, there is the *dictum* of Holt, of which I will say no more. The date of *Stone v. Evans*, which was decided in 1776, is very material. *Dale v. Westerdell* was decided in 1797. In *Stone v. Evans*, according to a MS. note, Lord Kenyon said of *Eaton v. Jaques*, "I have heard that there has been such a case as the one cited." This shews that he had not very fully considered the

(a) *Eaton v. Jaques*.


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case on giving his *nisi prius* opinion, and is far from having the strength of the note in *Woodfall*. This, too, is said in 1796, prior to *Dale v. Westerdell*, which was decided in 1797. [*Park J.* In *Abbot on (a) Shipping, Stone v. Evans* is mentioned, and that evidence of possession was given: in *Dale v. Westerdell*, Lord *Kenyon* had not changed his opinion of *Eaton v. Jaques*.] The case of *Dale v. Westerdell* related to a mortgage of a ship; and an opinion was taken up by his Lordship, that a distinction might have been made between the case of mortgage and that of other assignments. No wonder, therefore, that Lord *Kenyon*, with imperfect recollection of the case, should think it was untenable on that distinction, not adverting to the true ground of the decision stated by Lord *Mansfield*, namely, the want of possession. In *Dale v. Westerdell*, he throws out these doubts, that he may not be taken to have acquiesced in that determination. An unjust prejudice has arisen against this case of *Eaton v. Jaques*, in consequence of the true ground of it not having been understood. All the cases decided respecting the assignees of bankrupts, strongly coincide with this authority. The commissioners assign to the assignees of the bankrupt all his estate; the assignees, by the same instrument, agree to accept the trust, and always execute a counterpart. [*Graham B.* Surely it is not, in those cases, a mere question, whether the assignees have entered, but, whether they have done any act whereby they shew assent to take to the property. They may take the profits, either by themselves or others, which latter course is a constructive entry.] In *Turner v. Richardson*, Lord *Ellenborough* sets out with saying, that entry and possession were requisite. *Wheeler v. Bramah* (b) and

(a) 4th ed. 19. n.

(b) 3 *Campb.* 340.

Bourdillon v. Dalton (a) shew that assignees are entitled to renounce, unless they have taken to the premises. There is no principle upon which they can be allowed to pick and choose, to accept what is beneficial and reject what is detrimental, except upon the ground that they have not taken possession. In *Jackson v. Vernon* (b), and *Chinnery v. Blackburn* (c), it did not occur to the judges that there was any thing to impeach the case of *Eaton v. Jaques*; and the only ground of the decision is, that the assignees had not taken possession. An absolute assignment, therefore, without possession, will not render the assignee liable; but there is a difference between an absolute assignment and a mortgage. The Court does not usually take notice of trusts; but where a bankrupt is trustee, they will not let the bankrupt laws carry to the creditors that which is not the bankrupt's. This action, then, which is founded on privity of estate, and in which all the estate and title must be vested in the Defendants, is not maintainable: their estate and interest is not perfected till entry; and it cannot be otherwise held, without holding that an estate for years lies in grant, a thing abhorrent to the principle of the common law.

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Vaughan, in reply. The case of *Eaton v. Jaques* has been overruled, and its principles are untenable. The Plaintiff meets it by the principle *Qui sentit commodum debet et onus sentire*; and the counsel for the Defendants begs the question, in saying that the assignee has not the benefit. He may, at any time, compel a sale for his benefit, and have every advantage which he could derive from the lease itself. The doctrine in *Bracton* has no reference to a chattel interest. The fallacy exists in laying on the Plaintiff

(a) *Peake, N. P.* 238. S. C.
 1 *Exp.* 233.

(b) 1 *H. Bl.* 114.
 (c) 1 *H. Bl.* 114. n.

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the burthen of shewing, that the Defendants were completely invested; whereas, the Plaintiff is only bound to shew, that they were so far invested as to make them subject to an action of covenant. In the passage of (a) *Littleton* respecting exchanges, it appears that an exchange may be by parol, and it is therefore, that actual entry must be shewn. The averment of entry is, indeed, an ancient averment; but, if it be an averment of fact and not of law, is it not marvellous, that in all the books it never was traversed, except in *Walker v. Reeves*? But of such a traverse, if the averment contained allegation of matter of fact, there must have been found many instances. The case (b) cited from *Cro. Jac.* is a direct authority that the estate and interest do pass. In the transfer by lease and release, the lessee must have some interest before entry; for, by reason of privity, it is clear that the release will extinguish the rent. An executor is liable to the extent of his assets, whether he enter or not; and he is assignee in law of the testator. *Bellasis v. Burbrick* determined only this, that a tenant at will would be liable on his occupation of land; and a lessee, on privity of contract. *Huckle v. Wye* is not shaken by the Defendant's argument; for, he was declared against as assignee of one *Serle*, *virtute cujus* he entered and was possessed, and the Court said *virtute cujus* was not traversable. *Sparkes v. Smith* is a distinct recognition by those who then sate in equity, that in judgment of law the assignee was liable. *Pilkington v. Shaller* is still stronger; for, in that case there had been a verdict at law, and it is no objection that it is not elsewhere reported. In *Stone v. Evans*, there certainly was evidence that possession had been taken; but when *Gibbs* offered to disprove that fact, Lord *Kenyon* said it was immaterial whether possession was taken or not; and, in *Dale v. Westerdell*, he had not changed his

(a) s. 62.

(b) *Saffyn v. Adams*, *Cro. Jac.* 60.

opinion.


opinion. With respect to the argument urged from the situation of the assignees of a bankrupt, the frame of the bankrupt laws is peculiar; and those cases of assignees have turned on the provisions of the bankrupt law. However, actual entry and possession is not that which the cases require; and the question is, whether the bankrupt's assignees take to the property, not whether they enter and are possessed. In many cases, assignees may take to property without going within a hundred miles of it. The question here is, does all the estate, interest, and term, vest in the party? It does; for, an assignee, by his deed, may convey over all the estate to another assignee. What less than the whole is taken? What does he take? The whole, or nothing? The argument on the other side requires that he should take nothing, if he do not take the whole. The passage in *Bacon's Abridgment* only establishes, that by the mere execution of the lease, a lessee shall not be taken to be in possession to all intents and purposes, but only if he clearly shew indication of his consent thereto. Where then is the estate? It cannot be in abeyance; it must be in the lessee. When he has manifested his determination to accept, does it not then pass from the lessee to the assignee, as it passed from the lessor to the lessee? It certainly must; and, if it so passes, the Plaintiff is entitled to recover.

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DALLAS C. J. now delivered the judgment of the Court. The question, which arises on this special verdict, is, whether, under the facts stated, the Defendants took all the estate and interest of the original lessee, by his assignment of the whole term of the lease, having taken such assignment as a security for the repayment of a sum of money lent, and the Defendants never having actually occupied, or, in fact, become possessed.

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And, first, it will be proper to refer to the nature of such an estate, as between the lessor and the lessee. The definition by *Littleton*, s. 58. p. 48. b., is, "tenant for term of years is where a man letteth lands or tenements to another, for term of certain years, after the number of years that is accorded between the lessor and the lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years;" and the latter words have been relied on, as shewing that entry is necessary to constitute a tenant for term of years, the words being "and when the lessee entereth by force of the lease, then is he tenant for term of years." As connected with the 58th section, the 59th is also to be attended to, which is in these words: "And it is to be understood, that in a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will by force of the same lease." In *Littleton*, s. 66., this is still further explained, and it is said, "Also, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same tenements after the death of the lessor, because the lessee, by force of the lease, hath right presently to have the tenements according to the form of the lease;" and "the reason (says Lord Coke) is, because the interest of the term doth pass and vest in the lessee before entry; and, therefore, the death of the lessor cannot divest that which was vested before;" but, "true it is," he says (a), "that, to many purposes, he is not tenant for years until he enter: as a release made to him is not good to him to encrease his estate before entry; but he may release the rent reserved before entry in respect of the privity;" and, "the lessee before entry hath an interest, *interesse termini*, grantable to another." In

(a) *Co. Litt.* 46. b.

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Littleton, s. 459., the distinction is taken between an interest in the term, and actual possession of the land; and it is said, "If the lessor release to the lessee all his right, &c. before that the lessee had entered into the same land by force of the same lease, such release is void; for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease." And this is explained by Lord *Coke* in his comment, who says, "A release, which enures by way of enlarging an estate, cannot work without a possession;" but, taking the distinction between the estate, the land, and the interest in the term, he adds, that a release before entry shall extinguish the rent; and, in further commenting on the words of *Littleton*, that the lessee had only a right to have the land by force of the lease, he says, by this "is not to be understood, that he hath but a naked right, for, then, he could not grant it over; but, seeing he hath *interesse termini* before entry, he may grant it over, albeit, for want of an actual possession, he is not capable of a release to enlarge his estate." And so, by Lord *Holt*, in *Cook v. Harris* (a), "the assignee has the estate in him before entry, though not to bring *trespass*," that being an action founded upon possession; but as between lessor and lessee, with respect to rent, this reason does not apply, for, the right to the rent and the liability to pay, vest by the lease and not by the occupation. In *Bellasis v. Burbrick* (b), it is laid down, "in debt for rent upon a lease at will, the Plaintiff must shew an occupation, for, the rent is only due in respect thereof, and, therefore, it must appear to the Court when the lessee entered, and how long he occupied; but, in debt for rent upon a lease for years, the Plaintiff need not set

(a) 1 *Ld. Raym.* 367.(b) 1 *Salk.* 209.


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forth any entry or occupation; for, though the Defendant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation." The same is reported in 1 *Lord Raymond*, 171., and, as concerns the present point, in these terms, "In cases of leases for years, the rent becomes due by the lease, and not from the entry, and there is no need to aver occupation, because, the lessee is liable to pay the rent, whether *he occupies or not*, but, in cases of leases at will, occupation must be averred." The doctrine in *Co. Litt.*, and the cases, to which I have already referred, are in point to shew, that actual possession is not necessary to render the lessee liable, under the lease, to payment of rent, and this leads to the question, whether there be any difference in this respect between the lessee and his assignee, or, as in this case, an assignee taking an assignment by way of security for a debt. And, first, in the case of an absolute assignment, it seems difficult, on principle, to understand on what the distinction can rest: for, if, by assignment, the lessee may grant to another all his interest in the term, and, by acceptance of such assignment, the assignee takes all the interest, which the assignor had in the premises; and if the assignor were liable before entry, or without entry, to which the authorities fully go, it seems necessarily to follow, that the assignee of the lessee is liable in the same way. But, the form of the declaration in such actions has been resorted to, and the allegation of entry and possession, it is said, is to be taken as an allegation of fact, not a conclusion of law, and, therefore, shewing entry and possession to be necessary. That this allegation may be matter of fact or of law, and, that this will depend upon the nature of the subject, is not to be denied; but the question is, how they are to be taken in cases like the present? If this question were altogether new,

new, they would constitute allegation of fact, with those who think entry necessary, of law, with those who think possession the legal effect of the assignment; so that it would still come round to the general question, whether actual entry and possession be necessary: but to say that they are necessary, because such is the form of the declaration, is, in effect, to beg the question; as the argument turns in a circle, when it is said, entry and possession are necessary, because the declaration so alleges, and, because they are necessary, the declaration does so allege. In *Cook v. Harris*, which was an action of debt for rent against the assignee of a term, the declaration contained no averment of entry and possession; and Lord *Holt* said, that the ancient method of pleading assignments was, *virtute cujus* the assignee entered and was possessed, but, that this method was now disused, for, the assignee had the estate in him before entry. But, in *Eaton v. Jaques*, this is denied by Mr. Justice *Buller*, who says, Lord *Holt* is mistaken, for that he (Mr. J. *Buller*) has looked into the precedents, and they always allege, *virtute cujus* the assignee entered and was possessed. Be it, therefore, that, in this respect, Lord *Holt* was mistaken; though the declaration in the case before him contains no such averment, either as to the original lessee, or the assignee of the lessee; still Lord *Holt's* authority, in point of opinion, remains precisely the same, namely, that such averment is not necessary, being only what the law would imply, opposed certainly by that of Mr. Justice *Buller*. And, admitting Mr. J. *Buller* to have been right as to the fact, that all declarations, before and since the particular case, contained, and still contain, this allegation, it would equally leave the question unsettled, of which description the allegation is to be considered, whether as matter of fact or matter of law; no case having

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having been cited in which, these words having been traversed, the traverse has been held good; and, it will immediately be seen, the only case decided is the other way. That case is the case of *Walker v. Reeves*, and it was covenant for rent reserved upon a lease, by an assignee of the reversion against an assignee of the original lessee. The Defendant pleaded two different pleas. The first was demurred to. In the second he stated, that before the rent in question became due, he assigned all the estate, title, interest and term of years, which he then had to come in the premises, to one *Riggs*, by virtue of which assignment *Riggs* entered, and was, and still is possessed thereof, &c. To this plea the Plaintiff replied, that, at and after the time when the rent in question became due, the Defendant remained and continued in possession of the premises, without this, that the said *Riggs*, at any time before the rent became due and in arrear, entered the premises, and was possessed thereof. The Defendant demurred to this replication, and shewed for cause, that the Plaintiff had therein traversed, and attempted to put in issue, matter of law only, and not any matter traversable or issuable. The Court took time to consider, and Lord *Mansfield* said, that they did not enter into the merits of the first plea, for that they were unanimous in thinking that the replication to the second was not good, unless it had gone farther, and charged the second assignment to have been fraudulent. By the assignment, the title and possessory right passed, and the assignee became possessed in law. This case is by no means like *Eaton v. Jaques*, for the assignment there, being a mortgage from the nature of the transaction, it was not an assignment to this purpose; it was a mere security. Taking it then, that the assignee is, after acceptance of the assignment, liable without entry and possession, *Eaton v. Jaques* will

will stand on its own peculiar ground, which is, that an assignment of a lease taken by way of pledge or security, differs, in this respect, from an absolute assignment, so that entry and possession are necessary to make such assignee liable. On the other hand, three cases in equity have been cited precisely similar to the present case. In the case of *Sparkes v. Smith*, the Court refused, on bill, to compel an assignee of a term on mortgage to discover his assignment; the object of the lessor in requiring it, being, to make the assignee liable to the covenants of the mortgagor, although he had not taken actual possession of the premises. The Court said, it was the mortgagee's folly to take an assignment of the whole term, whereby he subjected himself to the covenants in the original lease, instead of taking a derivative lease of all the term, but a month, week, or day; yet, as he was only mortgagee, and never in possession, they would not assist the Plaintiff, but left him to recover at law as well as he could. In *Pilkington v. Shaller*, 100*l.* were lent by way of mortgage upon an assignment of a building lease, and the mortgagees never entered or took possession, but lost the money lent. The Defendant in equity having recovered against the mortgagee, as assignee, the rent reserved on the lease, the bill was to be relieved against the recovery at law; and the Court dismissed it, saying, the mortgagee was ill advised to take an assignment of the whole term. In both cases the principle of law, that an assignee of a whole term is subject to the covenants of the original lease, is fully admitted. The different event of the application arose, merely, from the parties having changed sides on the applications to the (a) Court.

(a) *Powell on Mortgages*, c. iv. p. 80. 1st ed. vol. 1. p. 233. 235. 4th ed.

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The third case, *Lucas v. Comerford*, was bill by executors of lessor against the depository of a lease to secure a debt, for specific performance of a covenant in the lease to rebuild houses. Lord *Thurlow* said it was no matter whether the Defendant took the lease as a pledge or as a purchase, he could not take the estate without taking the burthen (a). The case of *Eaton and Jaques* stands, then, as a single case, opposed as I have stated; but, if there were no authority against it, is it upon principle to be supported? The assignment of a lease for the whole term, whether absolute, or subject to a proviso for re-assignment in a certain event, is, as far as concerns the interest, to be transferred precisely the same; and the assignment, as in the present case, is of all the right, title, and interest, of the assignor in the lease assigned. So completely does the interest pass from the one, and vest in the other, that there is a covenant to re-assign when the money shall be repaid. The whole interest is therefore assigned, and the whole is to be re-assigned. It vests then absolutely, till such re-assignment, in the party who is to re-assign; and is not less absolute, because, by agreement between the immediate parties, to which the lessor is no party, the assignor may, in an event which may or may not happen, entitle himself to a re-conveyance by the money being repaid. In the intermediate time, or till such re-assignment, the assignee stands in the situation of the assignor, and is, as against the lessor, subject to all the liabilities created by the lease; and, if the one were liable without entry and possession, the other is equally so; and, that the former would be liable, has, I conceive, been fully shewn. But, in this case, as it seems to me, there can be no doubt whatever; for, here, the special verdict finds, that the

(a) 1 *Ves. jun.* 235.

money was not paid on or before the day when, if not paid, the assignment was to become absolute: it did, therefore, become absolute; so that this is, strictly, the case of an absolute assignment, and subject, therefore, to all the rules which affect it as such. It has been further said, that there is no privity of estate, because possession was not taken; nor privity of contract, in respect of which the original lessee would be liable without possession. But it is not so; for there is privity of estate, if legal possession, that is, acceptance of the thing assigned by acceptance of the assignment, be equivalent to actual entry, which it is, if there be justice in the observations already made; and, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the Defendants here are the assigns of the lessee: it is, therefore, a contract between the lessor and the assignee, that is, in this case, between the Plaintiff and the Defendants. The cases of bankruptcy, which have been alluded to, stand on a different ground. In the case of actual acceptance, assignees would, of course, be liable, and they may accept without entry; but the assignment is not compulsory on them to take: if they do not take, they will not be liable, notwithstanding the assignment; but, if they elect to take, then it is their taking, but not singly by the assignment: they become liable as assignees. To the cases of *Dale v. Westerdell*, and *Stone v. Evans*, it will be sufficient merely to refer, as shewing the disapprobation which Lord *Kenyon* entertained and expressed of the decision in *Eaton v. Jaques*; and to this it is hardly necessary to add, what is well known, that it did not meet with the approbation of the profession at large, at the time. Remaining, however, as an authority, though a single authority, when this present case came before this Court on demurrer, it was directed

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directed by the late Chief Justice to be turned into a special verdict, that we might have it argued before all the judges, and collect their opinion on the point. This has accordingly been done; and we have authority to say, that, in the opinion of a great majority, *Eaton v. Jaques* is not to be considered as having been rightly decided. This case being therefore removed out of the way, and the law being otherwise clear, the consequence is, that the Plaintiff is entitled to judgment.

My Brother *Richardson* not having been present at the argument, declines giving any opinion.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Fifty-ninth year of the Reign of GEORGE III.

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Lord RIVERS v. PRATT and TROWBRIDGE.

June 15.

THIS was an action of trespass, for breaking and entering the Plaintiff's chace, and killing deer therein. The Defendant pleaded not guilty; and the question to be tried, was, whether certain lands in the parish of *Tollard Royal*, in *Wiltshire*, were within the chace called *Cranborn Chace*. In a former case, of *Lord Rivers v. King (a)*, a jury, after a trial that lasted two days, had decided, that lands in the parish of *Alvediston*, in *Wiltshire*, were not within *Cranborn* chace; and the new trial having recently been refused in K. B., where another Defendant, who had contested the same rights, had obtained a verdict.

In a cause concerning rights of chace, involving documentary evidence of great length and antiquity, together with much oral testimony, the Court would not grant a trial at bar, a

(a) Decided in *Trinity* term, 1818, K. B.

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Court of King's Bench had, after a very long argument, refused to send the case down to a new trial, being satisfied that the finding of the jury was right.

Lens Serjt., in the last term, had obtained a rule *nisi* for a trial at bar in the present case, on the following grounds. Two boundaries, he said, were ascribed to *Cranborn* chace; and the question was, which of these boundaries constituted the proper limit. The inward boundary comprized a space of about 16,000 acres, the outward boundary was nearly 100 miles in circumference, and there had been constant disputes between the proprietors of lands situated between these two boundaries, and the owner of the chace; the land owners contending, that the rights of chace extended not beyond the inward boundary; the chace owner asserting his right to deer pasture over the whole space between the two boundaries. It had been contended, that all the lands in *Wiltshire* were without the inward boundary. The learned Judge, who presided at the trial of *Lord Rivers v. King*, had solved the difficulty, by supposing, in his charge to the jury, that the space between the two boundaries was *purlicu*, which is defined by the older authorities to be the disafforested ambit of a forest, over which the owner of the forest has no other right, than, by himself and his keepers, to pursue the deer which escape out of his forest. This solution of the difficulty was perfectly new. [The learned Serjeant here went at great length into the evidence on the former trial, to shew, that the *locus in quo* could not be *purlicu*.] He then stated, that no trial at bar had been asked in the first cause, because this solution of the difficulty was not anticipated; that the whole question of the extent of the chace rights was involved in such ambiguity, and depended on the construction of so many documents, on which it was scarcely possible to suppose a jury competent to form an opinion, that the case could not be tried fairly in any shape, but by a trial at

bar. Many of the documents went back as far as 500 years. A special verdict, or case, as it must contain all this mass of documentary evidence, mixed up with statements of witnesses, would be so long, as to take up more of the time of the Court than a trial at bar; besides, if such verdict were imperfectly drawn up, the question could not be tried, and to state the case accurately, would be in effect to solve the difficulty; so that it did not appear how a special verdict or case could be drawn up. If it could be done correctly, it would put the one or the other party out of court. If an objection were made to the direction of the Judge who tried the cause, the whole evidence must be stated for the Court, and there again the same difficulties occurred as before. If a bill of exceptions were tendered, it must be put on record, and would go to the Court of King's Bench, who would be inclined to support their former judgment. He did not ask for a trial at bar, on account of the magnitude of the interests at stake, or on account of the number of witnesses and documents to be examined; but, because an effectual trial could not be had in any other way, as it could not be supposed, that a jury, of whatever probability, would be competent to weigh the various and difficult testimony, which would be laid before them from the transactions of 500 years past.

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Pell Serjt. now shewed cause against the rule, and contended, that the magnitude of the interests at stake, and the amount of evidence to be examined, were not sufficient causes for granting a trial at bar, which was entirely in the discretion of the Court. The only ground was difficulty in point of law; and how could it be said, that there was any difficulty here, when the Court of King's Bench, after a most patient hearing, had refused to send down to a second trial, a case, in which the same rights were contested.

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Lens having been heard in support of his rule,

DALLAS C. J. delivered judgment. This is a subject very extensive in its nature. I do not mean to under-rate its difficulty; but the merits, as to the present application, lie within a narrow compass. An application for a trial at bar is at all times within the discretion of the Court, and it is impossible to say, precisely, what circumstances will entitle a party to such a trial; but this I may say, that such a mode of proceeding is never conceded lightly, because, without considering the inconvenience arising from it to the Court, which I trust will never weigh, it delays the other suitors, and is necessarily productive of the most heavy expence; the application, therefore, should be made on strong grounds. I am not aware of any case similar to the present; but we are not now called upon to consider before trial had, whether on the ground of the magnitude or difficulty of the case, we shall grant a trial at bar. That season has gone by; a trial of these same rights has been had, and therefore we are now to see if there are any other grounds on which we can comply with this request. It is said, that no application was made in the first instance, because, the solution of the difficulty started by a learned Judge, now no more, had not been anticipated; and my learned brother called that solution a novelty. Taking it to have been so at the time when it was delivered by the learned Judge *at nisi prius*, it ceased to be so, after the arguments for a new trial. On what ground, then, can a trial at bar be demanded here, when another court, in a question concerning the same rights, would not so much as grant a new trial? If it be necessary, a bill of exceptions may be tendered; that, we are told, must be put on record, and go to the Court of King's Bench, which will be inclined to abide by its former decision. If so, there is

the power of bringing error to the House of Lords, where the decision must be final. Upon the whole, I think no grounds have been laid for granting a trial at bar.

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PARK J. I am of the same opinion. All the grounds urged for a trial at bar are insufficient. The alleged novelty of the solution, started by a learned Judge, does not come with a good grace, after two days of laborious investigation and patient hearing at *Salisbury*. No doubt the opinion was a novelty when it was first started, but it was no longer so, after having been canvassed four days in the Court of King's Bench. Whatever difficulty there may be in the case, it has been lessened by that discussion in the King's Bench; and though there might have been a reason, in a case of such great antiquity, for applying for a trial at bar in the first instance, there can be none now. My Brother *Richardson* concurs with us in opinion, and has desired me to express this in his absence.

Burrough J. concurred.

Rule discharged (*a*).

(*a*) *Richardson* J. was absent.

OLIVER and Others, Assignees of ROBERTS, a
Bankrupt, v. BARLTETT.

June 17.

TROVER for a rick of bark. At the trial before *Graham* B., at the *Buckingham* Spring Assizes, 1819, it appeared that *Roberts* had purchased the bark in 1815, Where the question was, whether a bankrupt had possession of a stack of bark as reputed owner: Held, that evidence of his being reputed the owner of it was properly admitted, facts having been proved, which amounted to a disposition of the property by him as owner.

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and that the invoice was made out in his name. A commission of bankruptcy was issued against him in April, 1817. The witnesses called by the Plaintiff proved, that *Roberts* had exercised repeated acts of ownership over the rick, between the times of his purchase and becoming a bankrupt, and, in particular, that he had given directions for the repair of the thatch, a few weeks before his bankruptcy; that he was always reputed to be the owner of the rick, and that credit was continued to him, upon the belief that the rick in question was, in fact, his. The witnesses on the part of the Defendant, who was father-in-law to the bankrupt, stated, that the Defendant purchased and paid for the bark, twelve months before the bankruptcy; but there was no evidence to shew that he had ever taken possession of the rick, or had mentioned the fact of purchase to any individual. The counsel for the Defendant objected, at the trial, to the admission of evidence of reputation that the rick was the property of *Roberts*; contending, that the evidence ought to have been confined to acts, which constituted a disposition of the property by *Roberts* as reputed owner. Evidence of reputation was nevertheless admitted, as appears above, and the learned Judge, among other things, put it to the jury, whether *Roberts*, having been unquestionably the original owner of the bark, continued to be reputed so up to the time of the bankruptcy. The jury found a verdict for the Plaintiffs.

Blosset Serjt., having in the last term obtained a rule *nisi* for a new trial, was now, with *Lens Serjt.*, called upon by the Court to support the rule.—Evidence of reputation ought not to have been admitted in this case. The whole question turns on the eleventh section of the 21st of *James* the 1st (*a*), by which it is enacted, "that if

at any time hereafter, any person or persons shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt." This clause does not alter the rules of evidence respecting reputation, or make that evidence, which would not have been evidence before, but merely entitles the commissioners to take property, which the bankrupt may have in his possession, order, and disposition, as reputed owner: the evidence at the trial should therefore have been confined to establish the bankrupt's possession, and acts of ordering, or disposition, and not have been extended to let in loose reputation. Such possession is not the subject of legal reputation, evidence of which is admitted only from the necessity of the case, in matters of great antiquity or points of pedigree. Possession, as reputed owner, ought to be proved by specific acts; and it is not enough for a witness to say, that he believed the party to be the owner, or that he gave him a larger credit on that account. The statute uses the words "reputed owner" as apparent owner, and as opposed to real owner; and the question is, whether this man, with the consent of the real owner, had the disposition of the goods as reputed owner; for he might have had the disposition of them as factor, broker, or servant. Under the statute, therefore, evidence might have been given of various acts of ownership, and whether those acts were done in the character of broker, servant, or master; but evidence of reputation could never have

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been intended to be sanctioned in such cases. In *Gurr v. Rutton* (a), which was very distinguishable from the present case, Gibbs C. J. said, the jury must look to facts.

DALLAS C. J. It appears to me, that this case has nothing to do with the general rules of evidence, as to hearsay or reputation, but turns entirely on the construction of a clause in the statute of *James*. It is said to be the object of the statute to ascertain reputed ownership, and so it is; for if a party exercises a power over property, he shall be considered real owner, to put this property in the power of his creditors. The statute says, "If any persons, at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition, any goods or chattels:" the consent of the owner is to be taken as established by the exercise of acts of disposition over the property, throwing it on the other side to shew that no such consent was given. Then follow the words, "whereof they shall be the reputed owners, and take upon them the sale, alteration, or disposition, as owners." The word "reputed" is the emphatic word of the statute, to distinguish between the real and the apparent owner; and how is it to be ascertained that a party is the reputed owner, except by the admission of evidence to that effect? Whether abstractedly such evidence be proper, I will not here examine, because it is not necessary: the point here is, whether, under the circumstances of this case, and the enactment of the statute of *James*, the question, "Is the party, or is he not, reputed owner?" is a question necessary and proper to be put. I think it is a necessary and proper question. In these cases, the principal difficulty that arises, is, to ascertain who is the reputed owner; and

(a) *Holt, N. P. C.* 328.

this is much more a question of fact than of law. In *Muller v. Moss* (a), Lord *Ellenborough* says, the reputed ownership is a fact which ought to be found; and so it is laid down in a prior case in *Bosanquet and Puller* (b). I am, therefore, clearly of opinion, that evidence of reputation was properly introduced here. It is said, the case in *Holt* does not decide the present case: if it were necessary to resort to it, I think it does. There, in an action by the assignee of a bankrupt claiming property which the bankrupt was alleged to have had in his possession and disposition as the reputed owner, at the time of his bankruptcy, it was held competent for the Defendant, who had paid a valid consideration for the property, to give evidence of a contrary reputation, and to resist the claim of the Plaintiff, under the statute 21 J. 1. c. 19. s. 11., upon those grounds. *Gibbs* C. J. there says, "What is reputation of ownership? It is made up of the opinions of a man's neighbours; it is a number of voices, as it were, concurring upon one or other of two facts." And so I say here: beyond this it is not necessary to go. Whether reputed ownership could be proved in any case, without the evidence of facts to support it, I do not now decide; but, in the present instance, evidence of the reputation, supported by numerous facts, has been properly admitted.

PARK J. I also wish to be understood as not giving any opinion on the abstract question, whether reputed ownership may be proved by evidence of the reputation, without any facts to support it: but here we have many facts; and one of the witnesses, after stating various acts of ownership on the part of the bankrupt, ends his testimony with, "and therefore I thought *Roberts* the owner." My Brother *Blosset* has urged that the word

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(a) 1 M. & S. 338.

(b) *Lingham v. Biggs*, 1 B. & P. 87.?

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“reputed,” in the statute, is only used in the sense of “apparent.” It may be so; but on examining the preamble, we shall clearly see that it was the object of the statute to protect creditors from the effects of a false reputation. *Lawrence J.* says, in *Horne v. Baker* (a), “the question in these cases is rather a question of fact than of law;” and how is the fact to be made out? By the opinions of men, who have seen the party do certain acts, and, from those acts, have reputed him to be the owner of the property which may be in question. The case in *Holt* is exactly to the point. One witness has said, he was induced to continue his credit from the appearance held out; and this is the very case for which the statute meant to provide.

BURROUGH J. This is a question merely on the statute of *James*; and if we reject the evidence which has here been offered, we must also reject the word “reputed.” Without going into the doctrine of evidence at large, we need only confine ourselves to the circumstances of the present case. Every disposition of the property in question was made by the bankrupt, and his acts alone gave rise to the reputation that he was the real owner. Some of the witnesses might perhaps have given evidence of the reputation, without speaking of any specific act of ownership; but possession naturally gives rise to the idea of property, and it was not necessary that every witness should connect facts with the statement of reputation. If no case had been decided, I should be clearly of opinion that this evidence was properly received; but the very point has been laid down by the late Lord Chief Justice of the Common Pleas. There are various ways, in which the reputation of ownership might have been got rid of. It might have been shewn, for instance, that the bankrupt disposed of the property

(a) 9 *East*, 241.

as executor, and that the Plaintiffs were deceived by this appearance; but here the possession, disposition, and reputation of ownership, were clearly established.

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Lawes Serjt. was to have shewn cause against the rule.

Rule discharged (a).

(a) *Richardson* J. absent.

ATKINS and Others, Assignees of TREDGOLD,
 a Bankrupt, v. SEWARD and Others.

June 18.

IN this action, the Defendants, pursuant to statute (a), gave notice of their intention to dispute, at the trial of the cause, the validity of the commission of bankrupt issued against *Tredgold*, and the trading, act of bankruptcy, and petitioning creditor's debt, upon which the commission was founded. The case came on for trial before *Holroyd* J. at the *Winchester* Spring assizes, 1819; and after evidence adduced by the Plaintiffs, touching the matters mentioned in the notice, the Plaintiffs were nonsuited. The Judge certified, that the trading of *Tredgold* was admitted, and that the petitioning creditor's debt and the bankruptcy of *Tredgold* were duly proved. On the taxation of costs, the prothonotary thought he was not authorized by the statute, 49 G. 3. c. 121., to allow the assignees the costs of proving the matters contained in the Defendants' notice.

The assignees of a bankrupt, when nonsuited, are not entitled, under 49 G. 3. c. 121. s. 10., to the costs of proving, after notice to do so, the commission, trading, act of bankruptcy, and petitioning creditor's debt.

Pell Serjt. now moved for a rule to refer it to the prothonotary to tax the costs of the Plaintiffs, occasioned by the Defendants having given notice of their intention

(a) 49 G. 3. c. 121. s. 10.

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to dispute the commission, trading, act of bankruptcy, and petitioning creditor's debt. By the 49 G. 3. c. 121. s. 10., it is provided that "from and after the passing of this act, in any action now brought, or hereafter to be brought, by or against any assignee of any bankrupt, the commission of bankrupt, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt, unless the other party in such action shall, if Defendant, at or before the time of his pleading to such action, and if Plaintiff, before issue joined in such action, give notice in writing to such assignee that he intends to dispute such matters, or any of them; and where such notice shall have been given, if such assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial; and such assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs, which such other party would otherwise be entitled to receive from such assignee." The Plaintiffs, if not within the letter, are surely within the equity, of the act; for the legislature would never have given the Plaintiff the costs of establishing the bankruptcy, even where the Defendant obtains a verdict, if it had been thought proper that they should be withheld on a nonsuit. The act certainly has not specified the case of a nonsuit; but it says, generally, that the assignees shall be entitled to their costs.

BURROUGH J.

BURROUGH J. It does not follow that the legislature intended to allow the costs on a nonsuit, because they have allowed them on verdict. In the case of a nonsuit, the Plaintiff deserts his action.

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ATKINS

v.

SEWARD.

DALLAS C. J. The act is positive, and does not authorize us to allow the costs in this case.

PARK J. concurred.

Rule refused (a).

(a) *Richardson J.* absent.

CHEVALIER and Others, Executors of Fox,
v. FINNIS.

June 18.

LENS Serjt. on a former day had obtained a rule nisi, calling on the Plaintiffs in this cause, who sued as executors, to give security for costs, on the ground, that they resided in *Jersey*, out of the jurisdiction of the Court.

Plaintiffs, who live out of the jurisdiction of the Court, may be compelled to give security for costs, though such Plaintiffs sue as executors.

Hullock Serjt. now shewed cause against the rule, and insisted, that it was not a matter of course for the Court to order security for costs to be given, on the ground, that the Plaintiff lived out of the jurisdiction of the Court; and he cited *M'Culloch v. Robinson* (a). But the security required would at all events be nugatory in the present instance, for the Plaintiffs sued as executors, and therefore were not liable to costs.

(a) 2 N. R. 352.

Lens,

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Lens, in support of his rule, replied, that Plaintiffs suing as executors were not exempt from costs in all cases; and whether they might or might not be so exempt, in the present instance, depended upon the merits of the case, which the other side could not, in this stage of the proceedings, assume to be in their favour.

DALLAS C. J. The general rule is, that where a party lives out of the jurisdiction of the Court, he must give security for costs, if application to that effect be made at a proper stage of the proceedings. My Brother *Hullock* has attempted to distinguish this case, by saying that the Plaintiffs, as executors, would not be liable, and therefore security is only nugatory. If the law be so, that the Plaintiffs cannot be liable, the inference drawn is correct; but the Plaintiffs may be liable though they do sue as executors: I think, therefore, security ought to be given.

The rest of the Court concurring in this opinion, they made the

Rule absolute (a).

(a) *Richardson J.* absent.

June 21.

PAYNE v. ACTON and Others.

Where the Defendants were held to bail for 130*l.* 0*s.* 11*d.*, and the cause being referred to an arbitrator, he

found that only 20*l.* 4*s.* 9*d.* was due from them, the Court would not allow the Defendants their costs under 43*G.* 3*s.* 6*d.* 5*s.* 3*d.*

THE Plaintiff held the Defendants to bail for 100*l.*

The particulars of his demand were, a sum of 130*l.* 0*s.* 11*d.*, due from the Defendants to the Plaintiff, on a former balance of 36*l.* 13*s.* 3*d.*, on charges for lighterage, portorage, and freight, in respect of oats,

hay,

hay, and straw; on a further sum for the hire of sacks, and money paid for metage. The cause came on to be tried at the *London* sittings after *Easter* term, 1819, when, by consent of the parties, a rule of Court was made, that a verdict should be entered for the Plaintiff, with 300*l.* damages, subject to an award. On the arbitration, two witnesses deposed, that the Plaintiff had verbally agreed with the Defendants for the sum of 4*d.* per quarter for the lighterage of oats, and at 4*s.* 6*d.* per ton for the lighterage of hay; whereas he had charged the lighterage of oats at 6*d.* per quarter, and of hay at 7*s.* 6*d.* per ton, making an overcharge to the amount of 85*l.* 9*s.* 7*d.* The arbitrator awarded the Plaintiff a verdict for 20*l.* 4*s.* 9*d.*

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v.
ACTON.

Cross Serjt. now moved that the Defendants might be allowed their costs, under the 43 G. 3. c. 46. s. 3., on the ground of an arrest without probable cause.

DALLAS C. J. The Court have always attended to the circumstance of the parties going before an arbitrator. There does not appear to have been any vexation here, but an ordinary difference about the terms of an agreement which was never reduced to writing. There is no ground for allowing the Defendants their costs.

The rest of the Court concurred.

Rule refused.

MARTIN v. BURTON.

June 22.

REPLEVIN for goods. Cognizance, that Plaintiff from the 29th of *September*, 1817, until and upon the

Where the bailiff of an executrix made cognizance

in replevin for arrears of rent incurred in the life-time of the testator, and a verdict was found for the Defendant, the Court would not permit the Plaintiff to enter up judgment *non obstante verdicto*, on the ground, that the record did not shew the executrix to be entitled to distrain, under the 32 H. 8. c. 37. s. 1.

25th

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25th of *March*, 1818, and from thence until the death of *Joseph Arden*, which happened on the 10th of *April*, 1818, held and enjoyed the dwelling-house in which, &c., with the appurtenances, as tenant thereof to *J. A.*, under the yearly rent of 30*l.*, payable quarterly, to wit, on the 25th of *March*, the 24th of *June*, the 29th of *September*, and the 25th of *December*, in each and every year; and because the sum of 15*l.* of the rent aforesaid, for the space of half a year of the said time, ending on the 25th *March*, 1818, was due and in arrear to the said *J. A.*, deceased, in his life, and continued so in arrear and unpaid, until and at the time of the death of the said *J. A.*, and from thence until and at the time, when, &c. continued in arrear from the Plaintiff to *Temperance Arden*, as executrix of *J. A.*, Defendant well acknowledges the taking of the goods and chattels in the declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. as for and in the name of a distress for the said rent so due and in arrear as aforesaid, and which said rent still remains due, and in arrear, and unpaid; and this the Defendant, &c., and therefore, &c. Profert of the letters testamentary of *J. A.*, whereby it appears that the said *T. A.* is executrix of the will of the said *J. A.* Pleas, *non tenuit, riens in arrears*, and eviction. The cause was tried before *Dallas C. J.*, at the sittings after last *Easter* term, and a verdict found for the Defendant.

Hullock Serjt. on a former day moved to enter a judgment for the Plaintiff *non obstante veredicto*, on the ground, that an executor's right to distrain is given by statute (a), and it is a rule, that where a statutable authority is given, a party justifying under it, must bring himself distinctly within the terms of the

(a) 32 *H. 8. c.* 37. *J. I.*

statute. An avowant is in the nature of a Plaintiff, and must make a good title *in omnibus*. The executrix could not have distrained at common law; and it is only the personal representative of a party seised in fee, in tail, or for life, of the rents mentioned in the statute, who is empowered by the statute to distrain. In *Turner v. Lee* (a), it was held, that the executors of the grantee of a rent-charge could not distrain for the arrears, under this statute. The present cognizance omits altogether to state what title the testator had; and for any thing that appears, he might only have had a rent, for which the executrix was not entitled to distrain. [*Burrough J.* There is nothing in issue here which calls on the party to shew any title at all. See *Powell v. Kellick* (b).]

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BURTON.

Vaughan Serjt. now shewed cause. It is quite sufficient, if it does not appear on the record that the testator had a rent for which his executor could not distrain. *Turner v. Lee* only decides, that the executors of the grantee of a rent-charge cannot distrain, not that the precise title of the testator must in all cases appear upon record. But what is there on this record to shew, that the testator was not seised of such a rent as would entitle his executor to distrain? The case of *Meriton v. Gilbee* (c), lately decided, entirely governs the present.

Hullock, in reply, insisted on the principle, that a party acting under a statutable authority ought to bring himself within the terms of it, and urged, that in avowries under the statute of 8 *Anne* (d), (by which

(a) *Cro. Car.* 471.(b) *Selw. N. P. Distress*, iv.(c) 2 *B. Moore*, 48.(d) *c.* 14. s. 6.

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a lessor is enabled to distrain for arrears six calendar months after the expiration of the lease, provided the landlord's title and the tenant's possession continue,) the party always shews his case to fall within the statute. If he were not concluded by the late decision in *Meriton v. Gilbee*, he could argue with effect.

DALLAS C. J. The point in question was decided in that case, and the Court sees no reason to alter its opinion.

RICHARDSON J. This is an application to enter up a judgment *non obstante veredicto*; such an application cannot be entertained, unless it appears upon record that the party making cognisance has no title. The rest of the Court concurring, they

Discharged the rule.

June 22.

HULL v. PICKERSGILL and Others.

The house of the Plaintiff, an uncertificated bankrupt, was broken open, and effects acquired by him

TRESPASS for breaking and entering Plaintiff's dwelling-house, making a disturbance there, forcing his locks, and carrying away his goods. Pleas, first, not guilty. Second, that the several supposed trespasses were done by the authority of an act of parlia-

ment, subsequently to his bankruptcy taken by the Defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The bankrupt having sued the Defendants in trespass, they obtained, after a rule for plea, a surrender of the assignees' interest in the effects seized: Held, that this was a ratification of the seizure, and that the Plaintiff could not recover.

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ment, made in the 19th year of *Elisabeth* (a), intituled, "An act touching orders for bankrupts." Third, that the supposed trespasses were done by virtue of an act of parliament made in the first year of *James* (b), intituled, "An Act for the better relief of the creditors against such as shall become bankrupts." Replication to the second and third pleas, *de injuria*.

On the trial before *Dallas* C. J., at the *Middlesex* sittings after *Easter* term last, it appeared, that the Plaintiff, an uncertificated bankrupt, convened in *February* last, the creditors to whom he had become indebted since his bankruptcy, and proposed to pay them five shillings in the pound, if they would release him from all demands, and forbear to enquire into the reason of his difficulties. Upon their hesitating to accede to this proposal, the Plaintiff told them he was an uncertificated bankrupt, and that if they would not take the 5s. in the pound, they would have nothing. Thereupon the Defendant *Pickersgill*, a creditor to the amount of 600*l.*, arrested the Plaintiff, entered his house, and, with the assistance of the other Defendants, seized the goods for the general benefit of those interested. The creditors under the commission of bankruptcy issued against the Plaintiff, being informed of what had passed, and that an action had, in consequence, been commenced against the Defendants, empowered the assignees to surrender to the Defendants all the interest which the assignees had under the commission, in the goods in question. This surrender was made on the 4th of *May*, after a rule for a plea had been given. The order for the surrender was given on the 14th of *April*, and application on the subject was made to the solicitors of the assignees, before the present action was commenced. The jury found a verdict for the Defendants.

Vaughan Serjt., on a former day, had obtained a rule

(a) c. 7.

(b) c. 15.

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nisi to set aside this verdict, and enter a verdict for the Plaintiff, on the ground, that an uncertificated bankrupt, who acquired property after his bankruptcy, had a sufficient title in it to maintain trespass against all the world but his assignees; that the subsequent assent of the assignees, to the trespass in this case, came too late, after an action had been commenced; that, at all events, such ratification could only be made in actions of contract, as appeared by *Lucena v. Crawford* (a), and that the assignees themselves were only entitled to break the bankrupt's locks by virtue of the statute of 21 Jac. 1. (b), which did not apply to strangers.

Lens Serjt. now shewed cause. The bankrupt has no property, even as against strangers, unless the assignees have given some evidence that they recognize his possession; but here there is no evidence whatever of their recognition, or assent. The Defendants, therefore, are relieved from shewing that there has been any ratification from the assignees in this case, it not having been proved that the Plaintiff had any title to bring the action; and in all the cases where the bankrupt has been protected, there has been an assent on the part of his assignees (c). But, at all events, here, is a full and distinct ratification by the assignees of all that has been done by the Defendants, so that the entry must be considered to have been made by the Defendants on the part of the assignees, who had an undisputed right to enter and take away property entirely their own. The statute of 21 Jac. 1. has no application whatever to the present case, and was not introductory of any new law, but passed, merely to remove doubts which had existed as to the powers of the assignees and commissioners.

(a) 3 B. & P. 75. 2 N.R.
269. 1 Taunt. 325.

(b) c. 19. s. 8.

(c) *Webb v. Fox*, 7 T.R. 291.
Fowler v. Down, 1 B. & P. 44.

The doctrine of ratification was applied to torts, long before it was applied to contracts, in the case of *Lucena v. Crawford*.

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Vaughan, in support of the rule. The legal effect of the statutes of bankruptcy is not such as to put the uncertificated bankrupt, when contending with strangers, to the necessity of shewing, that he has the assent of the assignees to his possession of property. As against them, he has no property without their assent, but he has a sufficient title to maintain trespass against the rest of the world. Then, again, the assignees have no right to the bankrupt's future effects, unless his first property be insufficient. With respect to the doctrine of ratification, that may have some weight, where the thing ratified is done for the benefit of the ratifier, but if not, his subsequent agreement cannot purge the original wrong. In *Lucena v. Crawford*, the insurance was made for the Crown, and therefore availed for the benefit of the Crown afterwards. [Park J. The Dutch commissioners, in that case, had no notion they were insuring for the Crown.] If the Defendants had said, at the time, that they entered on the part of the assignees, it would have been no answer, after a subsequent ratification, to have said, that they had no communication with the assignees. But the fact was quite otherwise, and the seizure was never made for their benefit. If the Defendants had brought an action for being turned out of the house, could not the Plaintiff have pleaded his possession, and *molliter manus imposuit*? A defence always goes to the time of plea pleaded, and how can this, which arrives after the time for pleading, be any justification, when it is considered, that the entry was not made for the assignees. There is no authority directly in point; but, in *Silk v. Osborne* (a), it is laid

(a) 1 Esp. 140.

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down, that third persons shall not set up the Plaintiff's bankruptcy as a defence. At all events, the Defendants are liable as to breaking the house, for that was the Plaintiff's freehold, and might have been acquired after the bankruptcy, in which case, a fresh assignment is necessary, as to real property, though not as to personal.

DALLAS C. J. No distinction was made at the trial, between the house and the property in it, nor was it shewn, that the Plaintiff had any freehold in the house; and the ground in dispute was narrowed to this, whether the subsequent adoption by the assignees of the entry and seizure made by the Defendants, could justify them in the course which they had pursued. What then are the facts of this case? It is admitted, that the property in question is not the property of the Plaintiff, but of his assignees, and this appears from his own statement made to the subsequent creditors. These creditors, hazarding the consent of the assignees, seize their property, and, after the seizure, apply to them for a ratification of what had been done, though, at the time when it was done, it was not known who were the assignees: but it was known, that there had been a previous bankruptcy, and that the property in the Plaintiff's possession belonged to assignees; and those assignees, on being applied to, agree to sanction the conduct of the Defendants, and invest them with the rights of the assignees. The rule of law is, that he, for whom a trespass is committed, is no trespasser unless he agrees to the trespass; but if he afterwards agrees to it, his subsequent assent has relation back, and is equivalent to a command, according to the well-established maxim, *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*. It cannot be contended here, that the assignees themselves had not a right to seize the goods in question, and, therefore, by
their

their subsequent assent, they have, in effect, commanded the act complained of. But it has been argued, that this was not done for their benefit at the time. Every presumption is to be made against a Plaintiff such as this; and the subsequent application to the assignees for their assent, was a recognition by the Defendants, as well of the assignees' interest in the property, as that these interests had been remembered in the seizure. If it were necessary that the assignees should have had an interest at the time of the seizure, such an interest is clearly established by the evidence. No steps were taken to defeat it; and, as the assignees might have taken advantage of what was done, it must be considered as having been done for their benefit, at the hazard of their transferring that benefit to the Defendants themselves.

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PARK J. I am of the same opinion, and chiefly on the ground of *ratihabitio*. That doctrine was well argued in *Hagedorn v. Oliverson* (a), and, it was there urged, that the rule was applicable to torts only, and not to contracts. The distinction which has been urged by the counsel for the Plaintiff, was also taken there, in a case cited from the year books (b), concerning the seizure of a heriot by a party not entitled. In that case it was said, that, if the party seized the beast for himself, he would be liable in trespass, but if he did it for the lord, or said nothing at the time, the law allowed the lord to adopt his act. In the present case, the evidence amounts to an adoption equally clear. The Defendants go to the Plaintiff, who says that the goods are not his property; the Defendants seize them, knowing them to belong to the assignees, and taking it for granted, that the assignees would do what they ought to

(a) 2 M. & S. 485.

(b) 7 H. 4. 35.

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do: The assignees afterwards fully adopt the act of the Defendants, and thereby give it the sanction of a prior command.

BURROUGH J. The question is, whether there was evidence before the jury to justify this verdict, and I am of opinion there was. The case from the year books is very strong to the point. In the present case there was no express command, but the Defendants could only act under the commission, and the assignees afterwards confirm all that had been done.

RICHARDSON J. The question is, whether the Defendants have taken the goods for the benefit, that is, with the authority of, the assignees; and the facts of the case shew that this was so. I agree, that in no case ought the law to be strained, but if we can find a valid ground for deciding according to the justice of a case, it is most desirable to do so. The Defendants here, thinking they should find more justice on the part of the assignees than on the part of the bankrupt, venture to take goods for the assignees, in hopes that they would ratify the seizure. They did so, and the Defendants must therefore be considered as having acted under the command of the assignees. As to the house, it was not suggested at the trial that the Plaintiff had a freehold interest in it, and if he had only a chattel interest, the assignees had as much right to the house as to the goods. The act of *James*, which has been alluded to, only provides, that it shall not be necessary for the assignees, in making a seizure, to take any further warrant from the commissioners than their first assignment. There is no ground whatever for disturbing this verdict.

Rule discharged.

1819.

June 22.

ARCHER v. CHAMPNEYS.

A RULE *nisi* had been obtained by *Lens* Serjt. to cancel the bail-bond in this cause, on the ground, that the Plaintiff having brought a former action, which had been non-prossed, could not hold the Defendant to bail a second time for the same cause.

Vaughan Serjt. now shewed cause against the rule, and cited *Harris v. Roberts* (a), to shew that the Plaintiff might arrest again after a nonsuit, and, according to *Bates v. Barry* (b), after a discontinuance. There was no vexation alleged in the present case.

Where the Defendant was arrested again after a *non-pross*, the Court allowed the bail-bond in the second action to be cancelled, the Plaintiff not shewing that the second arrest was not vexatious.

DALLAS C. J. The general rule is, that a party cannot be arrested twice for the same cause. The cases of a ponsuit or discontinuance are exceptions. It is for the Plaintiff to shew that the second arrest was not vexatious in the present instance. We must take it to be vexatious.

The rest of the Court concurring, the rule was made
Absolute.

(a) *Barnes*, 73.(b) 2 *Wils.* 381.

MARTIN and Others v. MORGAN and Another. June 23.

THIS was an action to recover money had and received to the use of the Plaintiffs. At the trial, before DALLAS C. J., (*Middlesex* sittings, after *Easter* check, knowing it to be post-dated, and that the maker of it was insolvent, and the Plaintiffs, in ignorance of these circumstances, paid the check for the honour of the maker, expecting funds from him in a short time, though they had none at the moment, a verdict having been taken for the Defendants, with leave for the Plaintiffs to move for a new trial, the Court granted a new trial.

Where the Defendants presented for payment a post-dated

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term last,) the following facts were proved or admitted. The Defendants had had accommodation-bill transactions with the firm of *Burmester* and Co.; and in the course of these transactions, a check on the Plaintiffs for 995*l.* 15*s.* 7*d.* was given by *Burmester* and Co. to the Defendants, on the 9th of *February*, post-dated for the 19th, to meet a bill falling due on that day. The Defendants, finding that *Burmester* and Co. were in bad circumstances, pressed them for 400*l.*, and threatened to present the check unless they received that sum. *Burmester* and Co. desired the Defendants not to do this, telling them they had no funds in the Plaintiffs' hands to meet such a demand. *Burmester*, in company with one of the Defendants, then went to *Minet* for assistance; and *Minet*, after inspecting the books of *Burmester* and Co., told the Defendants that *Burmester* and Co. were insolvent. One of the Defendants then said that he should wait till four o'clock, and unless he received 400*l.* from *Burmester* and Co. by that time, should present the check and expose them on 'Change. Instead of waiting till four, the Defendants presented the check at a quarter after three, and obtained payment; the Plaintiffs expecting to receive funds from *Burmester* and Co., though they had not any in their hands at the time the check was presented. At twenty minutes before four, *Burmester* and Co. sent a notice to the Plaintiffs not to pay any more on their account. The Plaintiffs were wholly ignorant of *Burmester* and Co.'s insolvency, of the bill transactions between them and the Defendants, and of the circumstance of the check being post-dated. A verdict was taken for the Defendants, the learned Judge directing an application to be made to the Court to set it aside, in order to a new trial being had. Accordingly, *Cross Serjt.*, for *Copley Serjt.*, on a former day obtained a rule *nisi* to set aside this verdict, on the ground, that the money was paid by mistake, the bankers'

clerk

clerk being ignorant that the check was post-dated; which post-dating made it illegal, under the 55 G. 3. c. 184.

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Vaughan Serjt. now shewed cause against the rule. *Burmester* and Co. were *bonâ fide* indebted to *Morgan* and Co., the Defendants, in more than the amount of the check in question. Now, if the claim were irresistible, as between *Burmester* and Co. and *Morgan* and Co., it was equally so as between *Morgan* and Co. and the Plaintiffs, who were no more than the servants or agents of *Burmester* and Co.; and where a party pays an honest debt through the intervention of his servant, it never can be urged that the servant can recover back the money paid. With respect to the alleged illegality of the check, that had no other effect than to render the party presenting, and the party paying it, liable to certain penalties under the 55 G. 3. (a); but the statute nowhere says that such a post-dated check shall be deemed void. The Plaintiffs acted with their eyes open, for they knew that they had no funds of *Burmester* and Co. at the time.

Cross, in support of the rule, was stopped by the Court.

DALLAS C. J. In this case, the Plaintiffs were certainly entitled to recover. The rule of law is, that where money is paid with full knowledge, or with full means of knowledge of the circumstances attending the demand, the party paying is not entitled to recover back such payment, though made without sufficient consideration. But if the money be paid without such full knowledge, or means of knowledge, or if the party be induced to pay it under false representations, he may recover back

(a) c. 184. s. 12.

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money paid under such circumstances. The facts of this case clearly shewed that there was an equitable claim between *Burmester* and Co. and the Defendants. This, however, is not a question between them, but between the bankers and the Defendants. As between these latter parties, what are the facts? An illegal draft is presented: so illegal, indeed, that if the bankers had knowledge of such illegality, they would have been liable to a penalty of 100*l*. Certainly, if they had known that, they would not have paid the bill. They were therefore kept in the dark; and by whom? By the very parties who now seek to retain the money so unfairly obtained. Now, is there any case in which the Court will allow a party to take advantage of his own illegal act? Undoubtedly, the Defendants have no means of meeting this objection to their claim; but are they better entitled on the other ground? It is urged that the Plaintiffs knew they had no funds of *Burmester* and Co.; but did they know, as the Defendants did, that they should have none at four o'clock? On the contrary, they had every reason to expect an early remittance from *Burmester* and Co. The Defendants, knowing there would be no such remittance, and availing themselves of every advantage, hurry to the banking-house, and procure payment of the check. Knowing the draft to have been illegal, they cannot, in point of justice, have any claim to retain a sum obtained in such a manner.

PARK J. I am of the same opinion. The parties did not stand on equal ground, the Defendants knowing the insolvent state of *Burmester* and Co., and concealing it from the Plaintiffs. The law was never doubted, that where a party pays with full knowledge of the circumstances, he cannot recover back what he has paid; but where he pays in ignorance, and without consideration,

the receiver cannot retain against him. *Bilbie v. Lumley* (a), and *Lowry v. Bourdieu* (b), are to the same effect. In *Chatfield v. Paxton* (c), there was no doubt as to the law, but as to the fact.

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BURROUGH J. At first I thought otherwise; but I am now clear, that the Plaintiffs ought to recover back this money. The Defendants concealed circumstances, which, if disclosed, would have prevented the Plaintiffs from paying.

RICHARDSON J. I am of the same opinion. It is not necessary to go into the ground of the illegality of the draft; but it is sufficient that the parties did not deal on equal terms. The Defendants knew that *Burmester* and Co. were in a state of probable insolvency, and concealed this from the Plaintiffs, who were ignorant of it. This brings the case within the rule of law, that a party paying money in ignorance of circumstances with which the receiver is acquainted, is not on equal terms with him, and therefore entitled to recover it back.

DALLAS C. J. expressed his regret, that in consequence of a mistake, the Plaintiffs had been confined to a motion for a new trial, instead of being allowed to move to enter a verdict.

Rule absolute.

(a) 2 East, 471.

(b) *Id.* 469.

(c) *Dougl.* 468.

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PHILPOTTS and Wife v. REED.

An insolvent's certificate, obtained in *Newfoundland*, under 49 G. 3. c. 27. s. 8., may be pleaded in bar to an action in *England*, for a debt contracted in *England* prior to the insolvency.

THE Plaintiffs declared in assumpsit for money had and received by the Defendant to the use of the wife, *dum sola*. The declaration contained the usual money counts, a count for interest, and a count on an account stated. The Defendant pleaded, first, the general issue; then, that after the making and passing of a certain act of parliament, made and passed in the 49th year of the reign of our Lord, the now King, intituled, "An act for establishing courts of judicature in the island of *Newfoundland*, and the islands adjacent, and for re-annexing part of the coast of *Labrador*, and the islands lying on the said coast, to the government of *Newfoundland*," and before the commencement of this suit, the Defendant and one *Patrick Hine*, were carrying on business under the firm and title of *Hine, Reed, and Co.*, as merchants and co-partners at *St. John's*, in the island of *Newfoundland*; and being such partners, afterwards, in due manner of law, in pursuance of and under the aforesaid act of parliament, were declared to be insolvent within the true intent and meaning of the said act; that afterwards, the major part of the creditors to the estate and effects of the Defendant and *Patrick Hine*, carrying on business at *Newfoundland* as aforesaid, did there duly certify, that such declaration of insolvency was repeatedly inserted in the *St. John's Royal Gazette and Mercantile Journal*, and that the property and effects belonging to the said estate had been taken possession of for the benefit of the creditors thereto, and that the Defendant had in all things conformed himself agreeable to the said act concerning insolvents; and did further certify, that the creditors, whose names and seals were signed and

and set to that certificate, were full one half in number and value of the creditors of the Defendant, who had duly proved their debts under the said insolvency, and testified their consent to the Defendant having such allowance and benefit as by the said last-mentioned act is allowed to insolvents, and to the said Defendant being discharged from his debts in pursuance thereof; which declaration of insolvency and conformity of the Defendant, was afterwards duly certified and confirmed by the Surrogate Court of *St. John's*, in the island of *Newfoundland*, being a court of competent jurisdiction in that behalf, according to the form and effect of the said act of parliament, as by the certificate of *Thomas Coote*, then surrogate, given under his hand, and under the seal of the Supreme Court of *Newfoundland*, (reference being had thereto,) more fully and at large appears; which certificate the Defendant now brings here into Court. And the Defendant further said, that the said several supposed promises and undertakings in the said declaration mentioned (if any such were made) were, and each and every of them was, made in respect of debts contracted in *Great Britain*, prior to the time when the Defendant was so declared insolvent as aforesaid; and this the Defendant was ready to verify," &c. The Plaintiffs took issue on the first plea, and demurred to the second: the Defendants joined in demurrer. There were three exceptions taken to the plea, but one only was insisted on; and the question intended to be raised by the demurrer was, whether a certificate of discharge as an insolvent, obtained from the *Newfoundland* courts under the 49 G. 3. c. 27. (a), is a bar to an action in the

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(a) The first section of the act extends the jurisdiction of the Court to *Great Britain*; the second gives the like jurisdiction to the Surrogate Court. Sections six and seven direct the distribution of insolvents' estates; and section eight enacts, "That a certificate obtained under a declaration of insolvency in *Newfoundland*, shall, when pleaded, be a bar to all suits for debts contracted in *Newfoundland* and in *Great Britain*, prior to the insolvency."

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courts in *England*, for a debt contracted in *England* prior to the insolvency.

Lens Serjt., in support of the demurrer, contended, that the general words of the act must be taken to be restrained by the subject-matter; that it would be a great hardship if creditors in *England* could be barred by a certificate in *Newfoundland*, though they might never have heard before of the party's insolvency, or have had any opportunity of proving their debts. It did not appear by the act, that they were even to share in the distribution, but rather, that the *Newfoundland* creditors were to have all. He cited *Pedder v. M'Master* (a), and distinguished *Odwin v. Forbes* (b), as in that case the Plaintiff had notice of the bankruptcy; adding, that the Privy Council had expressed their opinion against a plea resembling the present.

Copley Serjt. in support of the plea. The words of the statute are express, and cannot be explained away. There is no hardship in the enactment, because the Court has power to sell effects in *England* belonging to the insolvent, as well as effects in *Newfoundland*. If, therefore, the Defendant relinquishes his property in *England*, his certificate ought also to extend to that country.

Lens, in reply, urged, that it was not clear that the insolvent's property in *England* could be sold by the *Newfoundland* court. If the property here were liable to the process of that court, some notice in an *English* gazette would have been made requisite, which is not the case.

DALLAS C.J. The question here is, what are the words of the statute? For, if they are so plain as not to be mistaken, we must, at all events, be guided by them.

(a) 8 T. R. 609.

(b) *Buck's Reports*, 56.

In this case, the Defendant lived in *Newfoundland*, and carried on trade there: the debt in question was contracted in *Great Britain*. Now, the eighth section of the statute, under which the Defendant has pleaded his certificate, is in these words, "That if such insolvent person shall make a true disclosure and discovery of all his or her goods and effects whatsoever, and shall conform him or herself to the order and direction of the said court, the same shall and may (with the consent of one half in number or value of his or her creditors) be certified by the said court; and such certificate, when pleaded, shall be a bar to all suits and complaints for debts contracted within the island of *Newfoundland*, and on the islands and seas aforesaid, and on the banks of *Newfoundland*." If by the statute it was intended to confine the operation of the insolvent's certificate to *Newfoundland*, the statute ought to have stopped here; but it goes on, "And in *Great Britain* or *Ireland*, prior to the time when he or she was declared insolvent." It is impossible for us to reject these words. It has been contended, that there is no provision of the statute which enables the creditors of *England* to share in the distribution of the insolvent's effects; but it appears from the sixth section, that the distribution is to be made among all the creditors; and then comes the general clause, which expressly enables the insolvent to plead his certificate in bar to debts contracted in *Great Britain* prior to his insolvency.

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The rest of the Court concurred in giving

Judgment for the Defendant.

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June 23.

BLANCHENAY v. VAN-DEN-BERGH.

Where a Plaintiff, after being told it was not usual to obtain the *posted*, or to tax costs, till the evening of the fourth day of term, obtained the *posted* before four o'clock on that day, under a promise not to tax costs, and on pretence of wishing to effect the stamping; but, instead of doing that, signed judgment, and issued execution; the Court set aside the judgment and execution, allowing the Defendant all his costs occasioned by such proceeding.

The Court notified, that, for the future, the *posted* shall not be delivered till the morning of the fifth day of term.

PELL Serjt. on a former day had obtained a rule *nisi* to set aside the final judgment signed upon the *posted*, the taxation of the costs, and execution in this cause, and to compel the Plaintiff to pay the Defendant his costs occasioned thereby, together with the costs of the application, on the ground that the Plaintiff had conducted himself improperly in signing the judgment. It was, among other things, stated by affidavit, that on the fourth day of the term judgment was signed and costs taxed for the Plaintiff without any notice to the Defendant's attorney. That when the Plaintiff's attorney applied that morning to the associate for the *posted*, he was told that the *posted* was not usually delivered out till the evening of that day. The attorney then assuring the associate that costs should not be taxed that day, said, he merely wanted the *posted* for the purpose of having it stamped, and having obtained it on this pretence, signed judgment immediately, and issued execution the next morning.

Vaughan Serjt. now shewed cause against the rule; but,

The Court having enquired of the associate, and having found the above statement to be true, held, that the *posted* had been obtained under an improper representation, and therefore made the

Rule absolute.

A notification was also given by the Court, that, for the future, the *posted* should not be delivered out till the morning of the fifth day of term.

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HITCHON v. BEST,

June 25.

TADDY Serjt., on a former day, had obtained a rule *nisi* to change from *London* to *Worcester* the venue in this cause, which was an action for a libel contained in a letter written to the Plaintiff, on the ground that the cause of action arose at *Worcester*.

Blosset Serjt. now shewed cause against the rule, and read an affidavit, which stated, that the letter in question bore the post-mark of *Stafford*, and that the Plaintiff therefore believed it was written at *Stafford*, and he cited *Clissold v. Clissold (a)*, to shew, that the venue in an action for a libel contained in a letter written in one county, and sent into another, cannot be changed into the county in which it was written, because the Defendant cannot swear that the cause of action arose wholly in that county.

In an action for a libel contained in a letter, the Court would not change the venue from *London* to *Worcester*, after an affidavit that the deponent believed the letter to have been written at *Stafford*, because it bore the *Stafford* post-mark.

Taddy in support of the rule, contended, that in order to induce the Court to refuse his application, it should have been sworn, that no part of the cause of action arose at *Worcester*, whereas the party had only sworn to his belief that the cause of action arose at *Stafford*, and then gave an inconclusive reason for that belief. It did not follow that the letter was written at *Stafford* because it was put into the post there, and the Court would not hold the putting into the post, or the writing, to be a publication, unless the letter was put in unsealed, or the writing shewn.

Sed per Curiam. The putting the letter into the post at *Stafford*, is *primâ facie* evidence of its having been written there, and sufficient to support the affidavit of a belief that such was the case. The rule must be

Discharged.

(a) 1 T. R. 647.

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(IN THE EXCHEQUER CHAMBER.)

June 26.

The KING v. FROUD.

The 48 G. 3.
c. 75. enacts,
that bodies
thrown ashore
by the sea

THE prisoner was indicted (a) for forging and counterfeiting a certain warrant for payment of money, sealed with a certain seal, purporting to be given under shall be buried by the parish officers, and that, after such burial, a magistrate shall give the officers a certificate and order on the treasurer of the county to pay them the reasonable and necessary expences of the funeral, which the treasurer is by the act ordered to pay. The prisoner framed an order, purporting to be the order of a magistrate on the treasurer of a county, to reimburse one *Cose* the expences of burying a dead body cast on shore: Held, that this was a forgery, though there was no such magistrate as the individual mentioned in the order, and though the order did not state *Cose* to be a parish officer, or that the expences incurred were reasonable and necessary.

(a) By the statute 48 G. 3. it is enacted, That the churchwardens and overseers of the poor for the time being, of the respective parishes in which any dead human body shall be found thrown in or cast on shore, shall cause the same to be removed and decently interred so that the expences attending on such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person buried at the expence of such parish (a). That all necessary and proper payments, costs, charges, and expences, which shall be made or incurred in or about the execution of that act, shall be made and paid by the churchwarden or churchwardens, overseer or overseers, constable, or headborough for the time being, of such respective parishes and places as aforesaid (b). That it shall and may be lawful to and for any one justice of the peace

for the county or place within that part of the united kingdom called *England*, in which any such body or bodies shall have been so removed and buried as aforesaid by any writing under his hand, to order and direct the treasurer for such county to pay such sum or sums of money to such churchwarden and churchwardens, overseer and overseers, constable or headborough, for his or their costs and expences in or about the execution of this act, (after the same shall have been duly verified on oath,) as to the said justice shall seem reasonable and necessary; and such treasurer shall, and he is hereby authorized and required forthwith to pay the sum or sums of money so ordered and directed to be paid, to the person or persons empowered to receive the same, and such treasurer shall be allowed the same in his accounts (c).

(a) c. 75. s. 1.

(b) s. 5.

(c) s. 6.

the

the hand and seal of *John Pernown*, and purporting that the said *John Pernown* was one of his Majesty's justices of the peace, acting in and for the county of *Cornwall*, the tenor of which was as follows: "*Cornwall*, to wit, To the treasurer of the county rates. Whereas it appeareth to me, one of his Majesty's justices of the peace acting in and for the said county, that on the first day of *March* now last past, a dead human body was cast on shore in the parish of *Zenar*, in the said county; and whereas *John Cose* of the said parish hath made oath before me, that he hath laid out the sum of 3*l*. 5*s*. in and about the removal and burying of the said corpse; and which I allow to be the reasonable charges thereof, I do, therefore, hereby authorize and require you to pay the said sum of 3*l*. 5*s*. out of the monies in your hands, to the said *John Cose*, or his order. Given under my hand and seal, this 21st day of *March*, 1818. *John Pernown*."

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At the trial before *Holroyd J.*, (*Launceston Spring assizes*, 1819,) it appeared, that there was no such magistrate as *John Pernown*, no such parish officer as *John Cose*, in the parish of *Zenar*, and that the prisoner had buried no bodies; but having presented to the person who acted as treasurer for the county the paper above described, and several others similar to it, he succeeded in obtaining a large sum of money as a compensation for the expence of these pretended burials. The prisoner having been found guilty, his counsel objected, that the instrument in question was not a forgery, because no claim had been made by the prisoner as a parish officer, and the statute did not authorize payment to be made to any other person; and because there was no such magistrate as *John Pernown*. The learned Judge having reserved the points, the question for the opinion of the twelve Judges was, whether the instrument above set forth was a forgery.

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Williams C. F. now argued for the prisoner. The order in question, the forgery of which is the offence charged against the prisoner, purports to be an order of a magistrate, on the treasurer of the county rates, made under the authority of the sixth section of 48 G. 3. c. 75. The first section of the statute enables the churchwarden or churchwardens, overseer or overseers of the poor, decently to bury such dead human bodies as may be found cast on shore, so that the expences of such burial do not exceed the sum, which, at that time, is allowed in such parish for the burial of any person buried at the expence of the parish. This clause affords a reason for the legislature's having invested parish officers with the duty of burying such dead human bodies, and the office of disbursing the necessary expences incidental to that duty. They are naturally best acquainted with the expences attendant on the burial of the parish poor; they are the persons, to whom notice of any dead human bodies being cast on shore is directed to be given, and, by their situation, and office, they have the best means of scrutinizing and controlling the expenditure of the parish funds, and the strongest motives to do so. The fifth section of the statute, therefore, pursuing the same policy, provides, that all the expences of the execution of the act shall be paid by the churchwardens and overseers, &c.; and then the sixth section enacts, that a magistrate shall order the treasurer of the county to pay to such parish officer or officers the expences incurred in or about the execution of the act (after the same shall have been duly verified on oath) as to the magistrate shall seem reasonable and necessary. The treasurer is then ordered to pay the sum allowed in the certificate to the person empowered to receive the same. The justice, it is clear, has no authority to order payment, except according to the provisions of the act. The order in question is not an order within the act, but a mere nullity. The legislature

legislature has imposed particular duties on particular persons, and those persons are selected with a salutary policy. Those persons are the churchwardens, overseers, &c.; but the order in question does not state that the party to whom the treasurer is directed to pay the money, is a parish officer, or that such parish officer has duly verified the account on oath. The magistrate has no authority to direct the payment of one shilling, except to the several parish officers named in the act, such parish officers first having verified their claim on oath. The language of the clause which confers the authority on the justice is clear and explicit on this point. Now the prisoner was not a parish officer, nor does the order state him to be such, and the policy and just precautions of the legislature would be defeated, if the justice could make an order on the treasurer for payment of money to any indifferent individual. The salutary controul over the expenditure of the parish fund would be contravened by such a construction of the act. If the order in question be not an order within the act, it is a nullity; for the justice has no power to give an order for payment of money, other than the power which he derives from the provisions of the act. The signature to the order was not the signature of a magistrate, but if it had been the signature of a magistrate, and if the order had been genuine, the requisites of the act not having been complied with, the order was not compulsory on the treasurer. It was in the treasurer's power to treat it as a nullity; indeed it was his duty to treat it as such. If it be urged, that the order must be deemed a forgery, because the treasurer was imposed on, and had paid the sum mentioned in such order, that would be to argue, that the erroneous construction of the statute, or disobedience to its language by the treasurer of the county rates, would give validity to an instrument otherwise defective. It would be absurd to suppose,

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that the treasurer could be indictable for disobedience of such an order. In *Rex v. Moffat* (a); it was held, that a bill of exchange for less than 5*l.*, such bill not being framed in compliance with the directions of the 17 G. 3. (b), was a mere nullity, and the forgery of an acceptance to such bill no offence within the statute. *Wall's* case (c) was decided on the same principle. In the *King v. Russell* (d), the instrument was held to be no receipt, and yet that instrument more nearly resembled a receipt, than this instrument can be said to resemble a valid and compulsory order on the treasurer. So in *Rushworth's* case the order was considered a nullity. [Bayley J. There were two indictments in that case, one for forgery, another for obtaining money on false pretences. I directed an acquittal on the first, and the opinion of the Judges to be taken on the second. In their opinion the indictment was bad. The prisoner was indicted for addressing an order, under 17 G. 2. c. 5. s. 5., to the treasurer of the county. I thought the indictment insufficient, because the order was addressed to the treasurer instead of the high constable, and was not under seal. Holroyd J. In that statute there is a penalty of 50*l.* for the forgery.] That is a mistake which appears to have been made in the case of *Rex v. Graham* (e); the learned reporter says it was objected, that the 18th section of 17 G. 2. c. 5. expressly subjects the party forging an order of a justice upon the high constable, for the payment of 10*s.* for the apprehension of a vagrant, to a penalty of 50*l.* On carefully looking into the act, it will be perceived, that the penalty of 50*l.* is imposed by the 18th section, on persons who forge certain certificates, receipts, and notes mentioned in the act, and that the clause has no reference

(a) 2 East, Pl. Cr. 954.

(b) c. 30. s. 1.

(c) 2 East, Pl. Cr. 953.

(d) 1 Leach, 8.

(e) 2 East, Pl. Cr. 745.

whatever to such order for payment of money. The forgery of such an order was previously an offence of a more penal nature. In *Rex v. Rushworth* (a), it was held, that the forging of an order for the purpose of obtaining a reward for the apprehension of a vagrant, is not a forgery within the statute, unless it contain the requisites prescribed by the 17 G. 2. c. 5. s. 5., although drawn in the same form as such orders have usually been drawn; and what is there said by Mr. Justice Bayley is most material in favour of the prisoner. "If the justice had any power," says the learned Judge, "it was derived from the statute, but he had no power to make such an order as this, and if such a one had been made, the treasurer ought not to have obeyed it." So, in this case, the justice would have had no power to make an order on the treasurer to pay money to any person but a parish officer; he would have disobeyed the act from which he derives his only power, and the instrument would be a nullity, which the treasurer ought not to obey. This case is distinguishable from *Rex v. Lockett* (b); the transaction, there, was a mere mercantile transaction, and the instrument was one used by all mercantile men: on its face there was no ground of suspicion or mistrust; and, if genuine, it was a valid, operative instrument. In the present case, the instrument is of a peculiar nature, not negotiable or transferable as a check, but borrowing its validity or value, only, by pursuing the provisions of a particular act of parliament; it could not be offered without exciting attention, and on inspection, its defect and invalidity are apparent. The case of *Rex v. McIntosh* (c); turns on the 32 G. 3. c. 34. s. 2.; and in *Rex v. Graham* the order was correct on the face of it, and directed to the proper person. If genuine, it had all the requisites of a good order. The order in the present case is not

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(a) 1 Starkie, 396.

(c) 2 East, Pl. Cr. 942.

(b) 2 East, Pl. Cr. 940.

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verified on oath of the proper person, nor is it alleged so to be, and it may perhaps be added, that it does not state that the expences were reasonable and necessary. [Abbott C. J. Unless you make out that *Cose* was not a parish officer, your objections cannot be sustained.] *Cose* was not only not a parish officer, but he is not even stated to be so; on that fact the prisoner mainly relies.

Carter, for the crown. If the order assume to be fit for the purpose intended, it falls within the act. In all the cases cited, the order is made a nullity, if the directions of certain statutes be not complied with; but, in the present case, the act contains no directions as to the form of the order, no precedent given in a schedule, and the treasurer may pay on any form of order which may be presented to him. If this order purport to be made by a *Cornish* magistrate, it is sufficient that it is made for expences in burying a dead body; if a sufficient jurisdiction be shewn on the order, the money is paid rightly, though the person appointed to receive it be not described in the order. The order states, that the dead body was found on the shore, and that *Cose* buried it. The omission of an allegation that the expence incurred was reasonable and necessary, cannot vitiate the whole order; and there are several cases, in which instruments have been held to be forged, notwithstanding faults apparent upon the face of them. *Fitzgerald* and *Lee's* case (a). *Gade's* case (b). Admiral *Bradby's* case, tried before *Dampier* J. at *Winchester*, was an indictment for forging a receipt for money directed by statute 9 *Anne*, c. 10. (c), to be paid to persons who bring letters by ship to this country, and deliver them at the port of arrival. The prisoner gave the post-office at *Gosport* a certificate and receipt for the postage of 400 ship-letters,

(a) 2 *East*, Pl. Cr. 953. (b) 2 *Leach*, 732. (c) s. 16.

but

but it did not appear on the certificate or receipt that he was one of the persons appointed by the act to receive such money; namely, master or passenger. In the *King v. Rushworth*, the jurisdiction was not questioned. [Abbott C. J. That is all the difficulty. Where it appears that a party has jurisdiction, there is no difficulty. Here the magistrate has only jurisdiction to order payment to the churchwarden, &c.] If this order would have been a good voucher it must be deemed sufficient, and if the treasurer could shew that *Cose* was a parish officer, it would have been a good voucher. As it does not appear on the face of the order, that *Cose* was not a parish officer, it must be intended that the order was correct, and that the treasurer, when called on, could establish his payment. The principle *in favorem vitæ* is not applicable in the construction of a statute.

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Williams, in reply. The only person whom the treasurer has power to pay is not mentioned in the instrument, and the cases cited are all distinguishable from the case before the Court, inasmuch as the instruments which in those cases were the various subjects of indictment, were perfect instruments. As to the argument for the Crown, that, by the statute, the magistrate, by any writing under his hand, could make the order, it is quite clear that, in construction of law, the order must be made by a legal instrument, and such as the act authorizes.

No judgment was given in this case.

The prisoner was pardoned on condition of being transported for life.

* * Of the twelve Judges who were present, seven held the prisoner properly convicted; the other five did not think the order, stated in the case, such an order as would support a prosecution for forgery. The reporters are indebted to the kindness of one of their Lordships for this information.

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June 26.

The KING v. PAGE.

A bankrupt, who has surrendered to his commission, is not guilty of felony within 5 G. 2. c. 30., though he refuse to answer questions concerning his property.

The bankrupt lay in prison two months on a civil process, after a criminal process had been discharged, and the discharge had been delivered to his attorney: Held, that this lying in prison constituted an act of bankruptcy, though it did not appear that the bankrupt had personal notice of the discharge.

THE prisoner was indicted on the 5 G. 2. (a), for that he, being brought before certain commissioners of bankrupts, under a commission of bankruptcy that had been issued against him, feloniously did *not submit*, from time to time, to be examined upon oath, (he not being of the people called Quakers,) by and before the commissioners in the said commission named, or the major part of them by such commission authorised, and in all things conform to the several statutes made (and in force at the time of the making and passing a certain act of parliament, in the fifth year of the reign of his late Majesty King George the 2d, intituled, "An act to prevent the committing of frauds by bankrupts,") and fully and truly disclose and discover ALL his estate and effects, real and personal; and how, and in what manner, and to whom, and upon what consideration, and at what time or times, he had disposed of, assigned, or transferred, any of his goods, wares, merchandises, monies, or other estate and effects, (and all books, papers, and writings, relating thereunto,) of which he was possessed, or in or to which he was any ways interested or entitled, or which any person or persons had, or had had, in trust for him, or for his use, at any time before or after the issuing of the said commission, or whereby the said George Page, or his family, had, or might have, any profit, possibility of profit, benefit, or advantage, whatsoever, except only such part of his estate and effects as had been really and *bonâ fide* before sold and disposed of in the way of his trade and dealings, and except such sums of money as had been laid out in the ordinary expence of his family; and deliver up unto the said com-

(a) c. 30. s. 1.

missioners

missioners by the said commission authorised, or the major part of them, all such part of his the said *George Page's* goods, wares, merchandises, monies, estate, and effects, (and all books, papers, and writings, relating thereto,) as at the time when the said *George Page* was so first before *Henry Revell Reynolds*, *Robert Joseph Chambers*, and *Joseph Hickey*, the major part of the said commissioners named and authorised, to wit, on, &c., at &c., were in his possession, custody, or power, (the necessary wearing apparel of him the said *George Page*, and the necessary wearing apparel of the wife and children of the said *George Page*, only excepted,) but feloniously did make default and wilful omission in not submitting to be examined as aforesaid, to wit, on &c., at &c., with intent to defraud the creditors of him the said *George Page*, against the form of the statute in such case made and provided. At the trial before *Best J.*, at the *Old Bailey*, (*February* session, 1819,) it appeared that the prisoner was brought before the commissioners on the 3d *October*, 1818, (being the last day appointed for his surrender and examination,) that he took the oath administered to him by the commissioners, and, on being examined, (especially as to a sum of 500*L.*) declined to answer, alleging that he was unprepared, as he intended to dispute the validity of his commission. He was again brought before the commissioners on the 7th *November*, at *Guildhall*, and on being examined, (especially as to the 500*L.* mentioned before,) declined to answer, giving the same reasons for so doing as before. On the 28th *November*, he was again brought before the commissioners, and (advice having been first given to him by them touching the necessity of a proper answer, after all the time which had been allowed,) he again declined to answer the questions put to him.

It was objected on behalf of the prisoner, that he, having surrendered to his commission and taken the
 oath,

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oath, could not be guilty of felony by giving insufficient answers to the questions put, or declining altogether to answer questions. The learned Judge told the jury that the prisoner's answers were insufficient, and that to many very proper questions he had declined giving any answer; and, that, if the conduct of the prisoner, in giving insufficient answers to some of the questions, and refusing to answer others, proceeded from an intention to defraud his creditors, by preventing them from getting at his property, he was guilty of felony within the statute on which he was indicted: but, if they thought that the prisoner believed he was not a bankrupt, and that he was not bound to be examined, or, that he should prejudice his right to supersede his commission, in that case his conduct could not be said to proceed from an intent to defraud his creditors, and that his case was not within the statute. The jury convicted the prisoner.

The first question for the opinion of the twelve Judges was, whether, the jury having found, that the insufficiency of the prisoner's answers, and his refusal to answer questions, proceeded from an intent to defraud his creditors, the prisoner was properly convicted?

It further appeared at the trial, that the act of bankruptcy, on which the commission against the prisoner was founded, was his lying in prison from the 4th of *June*, 1818, to the 15th of *August*, in the same year. On the 14th of *April*, 1818, the prisoner was committed to *Newgate* by the warrant of a magistrate, upon the certificate of the commissioners of bankrupts, under a commission which had been issued against him, which commission was afterwards superseded. On the 16th of the same month, he was brought by *habeas corpus* into the King's Bench, and surrendered in discharge of his bail in several actions; but, it appearing that he was charged with the magistrate's warrant, he was taken out of the custody of the marshal, and re-committed to *Newgate*, charged with
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the actions and warrant. On the 18th of *April*, the commissioners, acting under the first commission, caused the prisoner to be brought before them, and committed him to *Newgate*, for refusing to be sworn, or to give any account of his property. On the 24th of *April*, the same commissioners again committed the prisoner, for refusing to answer certain questions put to him. On the 27th of *April*, the prisoner was discharged by the Court of King's Bench from the warrants dated the 18th and 24th of *April*, and he was re-committed by the Court, until he should submit himself to be examined by the commissioners named in the commission, or the major part of them. On the 12th of *May*, the commissioners certified, that they did not further intend to examine the bankrupt, and that they consented to his discharge, if the Court of King's Bench thought proper to discharge him from imprisonment under their rule. On the 15th of *May*, 1818, he was brought by *habeas corpus* from *Newgate*, and committed by *Holroyd J.* to the King's Bench prison, charged with the different actions, in which he was detained, and also with the warrant and rule of the King's Bench. On the 4th of *June*, an order of *Abbott J.* was obtained by the prisoner's attorney, (which was drawn up on the 5th,) which discharged the prisoner from all the detainers against him, except those in the civil causes. That order was obtained in term time: it was not made a rule of Court, and was not acted upon, and the prisoner remained in the King's Bench prison till the 15th *August*, 1818, when the commission of bankrupt issued against him, under which he was required to be examined on the 3d *October*, 1818. The prisoner's attorney stated at the trial, that he had given the prisoner no notice of the order of discharge. It was insisted, on behalf of the prisoner, that although he continued in the King's Bench prison from the 4th of *June* to the 15th *August*, charged with debt, yet, as the magistrate's warrant, for which he was detained until he should

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should be discharged by due course of law, was not got rid of, and the rule of the Court of King's Bench (which, it was insisted, was not discharged by Mr. Justice Abbott's order) was still in force, the prisoner was not detained merely for debt, and that such detainer was therefore no act of bankruptcy, and the case *Ex parte Bowes* (a) was referred to. The learned Judge expressed his opinion, that, as the prisoner could at any time get rid of these warrants of commitment, and the rule of the King's Bench, by submitting to be examined, his case was not like that of *Bowes*, who was detained in prison under a judgment for a crime, of which he had been convicted; and, that the order of Abbott J. did not discharge the rule made by the Court, but liberated the prisoner upon the occurrence of a new circumstance subsequent to the making the rule, viz. the certificate of the commissioners that they did not intend to proceed any further under that commission of bankrupt. If the prisoner, who obtained that order, had acted on it, he might have been discharged from every detainer except those on account of debts, therefore, his lying in prison was an act of bankruptcy. The second question for the opinion of the Judges was, whether the prisoner's lying in prison under the circumstances above stated, was an act of bankruptcy?

Copley Serjt. for the prisoner. The charge is, that the prisoner did not submit to be examined on oath before the commissioners. But it appears, that he did surrender himself, was summoned before the commissioners, and took the oath required. Some questions were then put, which, for reasons stated by himself, he declined answering. This is no felony within the words of the 5 G. 2. (b). That statute enacts, that if any person, who shall become bankrupt, shall not surrender himself to the commissioners named in the commission, or the

(a) 4 *Fes.* 168.

(b) 1. 30. s. 1.

major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, he shall be deemed to be guilty of felony; and by the sixteenth section it is enacted, that if any bankrupt or other person shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, it shall be lawful for the commissioners, or major part of them, by warrant under their hands and seals, to commit him or them to prison, there to remain without bail or main-prize, till such time as such person or persons shall submit themselves to the commissioners, and full answer make, &c. When a bankrupt has surrendered, appeared before the commissioners, taken the oath, and his examination has commenced, he has submitted to what is required of him by the statute. It was never meant, that if he refused to answer a question he should be deemed a felon, but, merely, that he should place himself in such a situation, as, that, if he refused to answer a question, the commissioners might be enabled to commit him to prison. If so high a penalty as death had been intended, the legislature would never have given the commissioners the additional and superfluous power of committing the bankrupt till he makes answer: indeed, the sixteenth section of the act is completely inconsistent with the construction contended for by the counsel for the crown. Then, with respect to the indictment, the statute enacts that the bankrupt shall be liable to the penalty of death, "in case of any default and wilful omission in not surrendering *and* submitting to be examined:" no such default of "not surrendering *and* submitting" to be examined is charged in the indictment. The default described by the statute consists of two parts: default in not surrendering, and default in not submitting to be examined: both of which ought to concur before the bankrupt can be liable to the penalty of death. The prosecutors could not, with any hope of success,

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success, state a default in both instances, for the bankrupt had surrendered; they have, therefore, entirely omitted that part of the offence which consists in not surrendering. But, in order to justify this omission in the indictment, the word "*and*" in the statute must be turned into "*or*," a liberty which cannot be taken with a penal statute, nor with any statute, unless where the construction renders it absolutely necessary to the sense, which is not the case in the present instance. The offence, therefore, which is laid in the indictment is not the offence described in the statute, but only part of it. The indictment is also faulty in another respect. Whenever a party is charged with an offence under an act of parliament, the indictment, in the description of the offence, must follow the very words of the act, and the order in which they stand. The offence described in the act is not submitting to be examined "*from time to time*," whereas the indictment charges the bankrupt with not submitting from time to time to be examined; and there is an essential difference between the two expressions. According to the indictment, the offence consists in not observing a succession of submissions, whereas, according to the act, the offence is constituted by not submitting to a succession of examinations. A construction adverse to the prisoner will lead also to an inconsistency in the act. If a bankrupt were to refuse to answer a question touching his property, that would be a concealment of his property, and, according to the construction contended for by the Crown, a capital offence in consequence of such refusal, though the property concealed might not be worth forty shillings; whereas, according to the act, a concealment of property is not capital, unless it be a concealment of property to the amount of 20*l.* (a). There are no cases on the subject; and an officer who has been applied to has searched in vain for precedents of such an indictment: the indictments

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dictments are always for not surrendering *and* submitting to be examined. The other ground of objection to this prosecution is independent of the indictment. By the provisions of the statute (a), a person using trade, &c. who lies in prison two months on an arrest for debt, is declared to be a bankrupt: but the party, here, was imprisoned on a criminal charge; and though he was afterwards detained for debt, that will not amount to an act of bankruptcy. He must be confined for debt alone; for he may not think it worth while to get rid of a civil demand when a criminal charge is hanging over him. In the present case, the warrant and rule of court of the King's Bench were criminal charges; and the rule of court was in operation when the bankrupt was brought before *Holroyd J.* to be charged in a civil action, and also to be remanded on the former warrant. Under these circumstances, the bankrupt remained in custody two months; which raises the point, whether custody for debt will constitute an act of bankruptcy, when the party is also under custody on a previous criminal charge. He then cited *Ex parte Bowes (b)*, to shew that lying in prison two months under a criminal charge is not an act of bankruptcy. [*Abbott C. J.* The criminal warrant was discharged. Did the bankrupt know that the order of discharge was obtained?]

Bosanquet Serjt. for the Crown. No question was made of this at the trial. The first point, whether or not it is incumbent on the bankrupt, within forty-two days, to surrender and answer interrogation under the penalty of felony, is not affected by the 16th section of the statute: the first part of the statute requires not only a surrender, but also a submission to be examined, and a giving up of property; and, in case of default,

(a) 21 Jac. I. s. 2.

(b) 4 Vesey, 170.

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enacts, "That the party offending shall be deemed to be guilty of felony, without benefit of clergy." Suppose a bankrupt, does not surrender till the forty-second day, and then refuses to answer questions, will the Chancellor say he has discharged the felony by coming and saying, I have surrendered? The examination, in the present instance, has, in effect, produced nothing but a refusal to answer. It was matter of fact for a jury to say whether the pretence for this was fraudulent, and the jury find that it was: the two things necessary to sustain this indictment are clearly made out. It appears from the examination, that the bankrupt refused to answer, and the jury have found that this refusal was with a fraudulent intent: unless the words, "submit to be examined," are struck out of the statute, the prisoner has committed a capital offence. There is nothing in the 16th section inconsistent with this interpretation of the statute: that section gives the commissioners a power to call, not only the bankrupt, but all other persons whatever; and it was never intended to affect others with capital punishment for the offence of refusing to answer. Besides, under that section, the bankrupt may be called on and committed before the forty-second day; but he is not liable to be indicted for felony, till a refusal after the forty-second day: that section, too, has reference to a variety of other matters. It is contended to be a fatal omission, that the indictment does not charge the bankrupt with a refusal to surrender; but this is the very question in dispute, and there is no known case or precedent on the subject. As to the concealment of property not being capital, unless the concealment be of property to the amount of 20*l*., the offence charged by this indictment is a refusal to answer; and no averment is made as to the amount of property concealed by such refusal. If such an averment had been introduced, it might have been necessary to prove it; but the refusal to answer is an offence of itself, whether immediately connected with concealment of property

or

or no. With respect to the insufficiency of the bankrupt's imprisonment to constitute an act of bankruptcy, a confinement under a criminal charge can only operate as an exception where the prisoner is unable to escape from it. But here, the prisoner was not prevented by the criminal charge from going at large; and, at all events, the magistrate's warrant was *functus officio*, when the commissioners sent the bankrupt to prison. Besides, a party cannot take advantage of a criminal act, where his conduct is influenced by other motives also; as, where a party went abroad to effect a seduction, and also to defraud his creditors, the going abroad was held to be not the less an act of bankruptcy because done with a view to a seduction (a).

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Copley, in reply, insisted that the warrant and rule of court were still in force, notwithstanding the detainer in the civil suit, and were not annulled by the commitment on the part of the commissioners. The prisoner's attorney was called to say that the prisoner had no knowledge of his discharge from the criminal commitment. The indictment ought to have charged the refusal to surrender and submit to examination, as constituting altogether one offence.

No judgment was given in this case. The prisoner received a pardon.

Of the eleven Judges who were present, (*Richards* & *B.* being absent,) eight held that the offence above charged was not a capital offence within the statute 5 G. 2. c. 30. s. 1. The other three thought that the prisoner's case fell within the statute. All the eleven held, that the lying in prison under the circumstances stated in the case, was a sufficient act of bankruptcy. The reporters are indebted to the kindness of one of their Lordships, who was present, for this information.

(a) *Raikes v. Poreau, Co. in Fowler v. Padget*, 7 T.R. Bank, L. 73. 5th edition, cited 511.

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June 23.

MORROW v. SAUNDERS.

Where Plaintiff made affidavit that he sued Defendant, to recover damages for a breach of agreement in not entering into partnership, pursuant to a partnership deed drawn up and signed by Plaintiff, but remaining in the custody of the Defendant or his attorney; and that the Plaintiff possessed neither copy nor counterpart of the deed; the Court granted a rule enabling the Plaintiff to inspect the deed and take a copy, though the Defendant swore he had not executed the deed.

On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart.

VAUGHAN Serjt., on a former day, moved for a rule to shew cause why the Plaintiff should not be permitted to inspect and take a copy of a certain deed of co-partnership, made between the Plaintiff and Defendant, and signed by the Plaintiff: he said the deed was not executed by the Defendant, though it remained in his custody; but the affidavit, on which he grounded his application, not stating that the Plaintiff had no copy or counterpart of the deed in his possession, the Court refused the application. He afterwards moved again, on an affidavit, stating, that the Plaintiff had brought an action to recover a compensation in damages for not taking deponent into partnership, pursuant to a certain deed of co-partnership executed by the Plaintiff, and in the possession or power of the Defendant or his attorney; that the Plaintiff had not, nor ever had, either copy or counterpart of the deed, and that no other deed or counterpart than the one mentioned, existed between him and the Defendant. On a motion for leave to inspect a partnership deed, the affidavit should state that the party moving has neither copy nor counterpart. The Court having granted a rule *nisi* on this last motion,

Hullock Serjt. now shewed cause against the rule. The Defendant makes oath that he never executed the deed, and in that case, it can be of no use to the Plaintiff. The Plaintiff does not state what species of action he intends to bring, or where the deed in question is accessible. In *Street v. Brown* (a), where an instrument was executed by two parties, each of them keeping one

(a) 1 *Marsh.* 610.

part, and one of the parties lost his deed, the Court would not compel the other party to produce his deed, in order to furnish the means of supporting an action against himself.

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The Court held that the present case was very different from that of *Street v. Brown*, and made the

Rule absolute.

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June 29.

COVENANT. The declaration stated, that by indenture of the 4th *July*, 1817, (after reciting a lease of the 9th *December*, 1815, from *John Parker* to the Defendant, for fourteen years, subject to the payment of rent, and performance of covenants, and also reciting, that the Plaintiff had agreed to purchase the Defendant's interest for 20*l.*) it was witnessed, that the Defendant sold the Plaintiff the messuage mentioned in the before in part recited indenture of lease, and all the term for years then to come in the premises; to have and to hold the residue of the said term of fourteen years, subject to the payment of the yearly rent, and to the performance of the covenants, conditions, and

Covenant for quiet enjoyment during a term, "without the lawful let, suit, interruption, &c. of *J. M.*, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having or claiming any estate or right in the premises, and that free and clear, and freely and clearly, discharged or otherwise, by *J. M.*, his heirs, executors, or administrators, defended, kept harmless and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents and arrears of rent, statutes, judgments, recognizances, made or suffered by *J. M.*, or by their or either of their acts, means, default, procurement, consent, or privy," preceded by a covenant that the lease was a good lease, notwithstanding any act of *J. M.*, and followed by a covenant for further assurance by *J. M.*, his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them: Held, *Park J. dissentiente*, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world.

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agreements, by and in the said in part recited indenture of lease reserved and contained; and the Defendant did, by the said indenture, (amongst other things) covenant with the Plaintiff, "that it should and might be lawful to and for the Plaintiff, his executors, administrators, and assigns, from time to time, and at all times thereafter, peaceably to enter into, have, hold, use, occupy, possess, and enjoy the said messuage, tenement, or dwelling-house, and all and singular the premises therein-before mentioned and intended to be thereby assigned, with their and every of their appurtenances, and to have, receive, and take, the rents, issues, and profits thereof, and of every part and parcel thereof, for and during all the rest, residue, and remainder of the said term of fourteen years, by the said in part recited indenture of lease granted, and then to come and unexpired, without any the lawful let, suit, trouble, hindrance, interruption, molestation, and denial of the Defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whatsoever, having, or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have, or lawfully claim; any estate, right, title, trust, or interest, either at law, or in equity, of, in, to, or out of the said messuage, tenement, or dwelling-house and premises, or any part or parcel thereof, and that, free and clear, and freely and clearly exonerated and discharged, or otherwise, by the Defendant, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, assignments, rents, and arrears of rent, statutes, judgments, recognizances, titles, charges, and incumbrances whatsoever, made, done, or committed, or wittingly or willingly permitted or suffered by the said Defendant,

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Defendant, or by, through, or with his, their, or either of their acts, means, default, procurement, consent, or privity, subject only to the rents, covenants, and agreements by and in the said thereinbefore in part recited indenture of lease reserved and contained, and on the the tenant's, lessee's, or assignee's part, thenceforth to grow due, and to be performed, fulfilled, and kept." Breach, that after the making of the said indenture, and before the expiration of the said term of fourteen years, thereby assigned to the Plaintiff, one *Sarah Parker*, widow, having, and lawfully claiming to have, lawful right and title, to the said messuage, tenement, or dwelling-house and premises, by the said indenture assigned, with the appurtenances, and having a lawful right of entry into the same, and lawful title, not derived, by, from, under, or by means of the Plaintiff, or any act done by the Plaintiff, or with his consent, entered into and upon the premises, by the indenture assigned, and in and upon the possession of the Plaintiff thereof, and lawfully ejected him from and out of possession of the same premises with the appurtenances, and hath lawfully kept the Plaintiff so thereout ejected, for a long time, to wit, from thence hitherto, contrary to the form and effect of the indenture, and of the covenant of the Defendant, in that behalf made as aforesaid. The Defendant craved oyer, and the deed was set out. Preceding the above covenant, there then appeared a covenant, "that for and notwithstanding any act, deed, matter, or thing whatsoever, by the said *J. Marshall* done or willingly permitted, the said indenture of lease is a good and subsisting lease, valid in the law, whereby to hold the messuage and premises for the residue of the term thereby granted, and not forfeited, surrendered, or otherwise determined, or become void or voidable." The covenant for quiet enjoyment came next, introduced by the words "and further that."

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Then came a covenant (as follows), for further assurance ;
“ And moreover, that the said *John Marshall*, his executors and administrators, and all and every other person or persons whomsoever, having, or lawfully claiming, or who may or shall, at any time hereafter, during the residue of the said term, have, or lawfully claim, any estate, right, title, or interest, either at law or in equity, of, in, to, or out of the said messuage, tenement, or dwelling-house and premises, hereinbefore mentioned, and intended to be hereby assigned, or any of them, or any part or parcel thereof, by, from, under, or in trust for him or them, shall and will from time to time, and at all times hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said *Charles Nind*, his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such farther and other lawful and reasonable act and acts, thing and things, assignments and assurances in the law whatsoever, for the further, better, more perfect, and absolute assigning and assuring of all and singular the said messuage, tenement, or dwelling-house and premises, hereinbefore mentioned and intended to be hereby assigned, with their and every of their appurtenances, unto the said *Charles Nind*, his executors, administrators, and assigns, for all the residue and remainder which shall be then to come and unexpired for the said term of fourteen years, therein granted by the said hereinbefore in part recited indenture of lease, as by the said *Charles Nind*, his executors, administrators, or assigns, or his or their counsel or attorney, shall be lawfully and reasonably devised, advised, or required.” The Defendant demurred, shewing as causes for demurrer, first, that it does not appear in or by the said declaration, that *Sarah Parker* had, or lawfully claimed to have lawful right or title to the said messuage,

messuage, tenement, or dwelling-house and premises, by the said indenture assigned, with the appurtenances, or had a lawful right of entry into the same, by means or in consequence of any act, deed, matter, or thing whatsoever, by the Defendant, at any time before the making of the said last-mentioned indenture, made, done, or committed, or wittingly or willingly permitted or suffered; and also, that it does not appear, in or by the said last-mentioned indenture, that the said *Sarah Parker* had, or lawfully claimed to have, lawful right or title to the said messuage, tenement, or dwelling-house and premises, by the same indenture assigned, with the appurtenances, by means or in consequence of any former or other gift, grant, bargain, sale, lease, mortgage, assignment, rent, or arrears of rent, statute, judgment, recognizance, title, charge, or incumbrance whatsoever, made, done, or committed, or wittingly or willingly permitted or suffered, by the Defendant, or by, through, or with his acts, means, default, procurement, consent, or privity; and also, that the said declaration is in other respects uncertain, insufficient, and informal, &c. The Plaintiff joined in demurrer. This demurrer was argued in *Easter* term, and the question was, whether the covenant for quiet enjoyment was confined to the acts of the covenantor, and those claiming under him, or extended to all the world.

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Lawes Serjt. for the Defendant. This is a qualified, and not a general covenant. If the latter part of the sentence be connected with the former, it will be clearly seen what the covenantor meant, by "all persons whatsoever." He covenants for quiet enjoyment against all persons whatsoever, *and that*, free and clear from all acts done by himself, or any claiming under him: unless the latter part of the sentence were designed to confine the expression "*all persons whatsoever*," to all persons claiming under the covenantor, it
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has no meaning; and the Court will put a construction on that latter part, not strike it out. The covenant, for further assurance, is of the same qualified nature, namely, that the covenantor, and *all who claim under him*, shall give further assurance for the term assigned. The covenant for quiet enjoyment is all one sentence, and at the beginning and end of it there are qualifying words, confining to the covenantor and those who claim under him the generality of the expression in the middle. The covenant for quiet enjoyment has, indeed, the general words, that the Defendant shall enjoy, without molestation of the covenantor, or "*any other persons whatsoever*." But how is the covenantee to enjoy? the rest of the sentence shews; "*and that clear of any acts done by the covenantor or those claiming under him*." Now the rule laid down in *Guinsford v. Griffith* (a), (the leading case on this subject,) is, "that if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first; or end of the last sentence, which in good sense may be applied to one and the other, there it shall extend to both sentences." In that case, indeed, the covenants were not so entire and blended, but that the first might stand absolute; but the rule is clearly laid down, and in *Browning v. Wright* (b), *Heath J.* fully confirms it. *Broughton v. Conway*, in *Dyer* (c), *Noble v. King* (d), and *Foord v. Wilson* (e), decided in this court, are in point. *Howell v. Richards* (f), is clearly distinguishable from the present case. In *Howell v. Richards*, there was no qualifying covenant to succeed the covenant against all persons whatsoever, except as to the chief rent; and *expressio unius est exclusio alterius*. The intention of the parties must be collected from a due consideration of

(a) 1 *Saund.* 60.(b) 2 *B. & P.* 13.

(c) 240.

(d) 1 *H. Bl.* 34.(e) *G. P. Mich.* 59 G. 3.(f) 12 *East*, 633.

the whole instrument taken together, and not from a single passage taken by itself.

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Vaughan Serjt. for the Plaintiff. There can be no doubt as to the principle, that the intention of the parties affords the true rule of construction, and that such intention is to be collected from the whole instrument taken together. Here, there are three covenants; one for title, a second, for quiet enjoyment, and a third, for further assurance; the second of these covenants is distinct and general. There is no case resembling the present, where such a covenant has been as it is here, a distinct and independent covenant. In *Browning v. Wright*, the Court held the expressions in dispute to be one sentence and one covenant. *Buller* J. said, the words, "and that" created all the difficulty, and if they were struck out, the whole sentence would form but one covenant, namely, "that, notwithstanding any act done by him, the grantor was seised of the estate, and had right to convey." In the present case, there is a distinct covenant against the acts of all persons whatsoever. *Forrd v. Wilson* was governed by *Browning v. Wright*; and Lord *Eldon* distinguishes the case of *Browning* and *Wright* from *Gainsford v. Griffith*, the latter being the case of a leasehold, where the title not being so easily ascertainable as in cases of freehold, the purchaser must require a greater security. The property in the present case is also leasehold, and it is reasonable to suppose the Plaintiff would require the most extensive covenant, as he could have no means of seeing the lessor's title. Why were the words "any other persons whatsoever" inserted, unless they were to have an operation? If they have an operation, they can mean nothing less than an absolute covenant. *Barton v. Fitzgerald* (a) is a case of leasehold property, and

(a) 15 East, 530.

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strengthens the Plaintiff's argument. In *Howell v. Richards*, the general covenant for quiet enjoyment is held not to be qualified by the covenant against the acts of the releasor, and therefore that case is also in point. If the party in the present case meant to restrain his general covenant, he ought to have inserted other restrictive covenants, and, as is usual in conveyances of a freehold, to have stipulated in a more cautious manner. Here, the covenant for quiet enjoyment is the same as in *Gainsford v. Griffith*, by which all the cases are governed.

Lawes, in reply, contended, that *Howell v. Richards*, *Forod v. Wilson*, and *Barton v. Fitzgerald*, were distinguishable from the present case; and that as to the argument drawn from the fact of the property being leasehold, it was much more likely that the owner of freehold property, who knew the extent of his own title, should covenant absolutely, than the assignor of a leasehold, who could have no means of discovering his lessor's title.

The Judges now delivered their opinions *seriatim*.

RICHARDSON. J. This is an action of covenant, brought on a covenant for quiet enjoyment contained in an indenture of assignment, by which the Defendant assigned his interest in a lease for a term of years to the Plaintiff; and the breach assigned is an eviction of the Plaintiff by a stranger. To this declaration the Defendant has demurred; and the question arising on the demurrer is, whether the covenant for quiet enjoyment be an absolute or a qualified covenant. The only safe rule to be followed in the construction of a deed is, the intention of the parties, to be collected from a due consideration of the whole instrument. This being the true principle of construction, I proceed to apply it to the indenture in question. This instrument begins with reciting a lease granted on the 9th *December*, 1815, by

one *John Parker*, to the Defendant, of a messuage and premises; to hold from the 25th *December*, 1813, for the term of fourteen years; subject to the payment of the yearly rent of 12*l.* quarterly, and to the performance of the covenants therein contained. It then recites, that the Plaintiff had contracted with the Defendant for the absolute purchase of the said messuage and premises demised by the said lease, and all his estate, term, and interest therein, for the sum of 20*l.* The indenture then witnesses, that in consideration of 20*l.*, the Defendant bargains, sells, and assigns to the Plaintiff, the said messuage and premises comprised in the said indenture of lease, and thereby demised, or mentioned, or intended so to be, together with the said indenture of lease, and all benefit and advantage thereof, and all the estate, right, title, interest, term for years to come and unexpired therein, trust, possession, property, possibility, claim, and demand, whatsoever, as well legal and equitable, of him the Defendant, of, in, or to the said premises; to have and to hold the said messuage and premises to the Plaintiff, for and during all the rest, residue, and remainder, now to come and unexpired, of the said term of fourteen years thereof granted/by the said indenture of lease, subject to the payment of rent and performance of covenants. Then follow the covenants by the Defendant to the Plaintiff. The first, for the validity of the lease, is clearly a qualified covenant, being, that for and notwithstanding any act, deed, matter, or thing, whatsoever, by the Defendant done or willingly permitted, the said indenture of lease is a good and subsisting lease, valid in the law, whereby to hold the messuage and premises for the residue of the term thereby granted, and not forfeited, surrendered, or otherwise determined, or become void or voidable. Then comes the covenant for quiet enjoyment, on which the breach is assigned, which is introduced by the words, "And further that," and runs thus: "That it shall be lawful

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ful for the Plaintiff, at all times, peaceably and quietly to enter into, occupy, and enjoy, the said messuage and premises, for and during all the rest, residue, and remainder of the said term of fourteen years, by the said indenture of lease granted, and now to come and unexpired, without any the lawful let, suit, trouble, hindrance, interruption, molestation, or denial of the Defendant, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having, or lawfully claiming, or who shall at any time thereafter during the term have, or lawfully claim any estate," &c. It has been argued, that the words of this covenant, "or any other person or persons whomsoever," especially as those words are superadded to the express mention of the covenantor himself by name, and his executors, administrators, and assigns, must extend, in necessary construction, to all mankind, having title, however derived. But it is to be observed, that the covenant for quiet enjoyment does not end here; but goes on to particularize the grounds, or causes of let or disturbance, from which the enjoyment covenanted for is to be free and clear; and all these will be found to be such as arise from acts done or defaults made by the covenantor himself. Now the Court is bound to give effect, if possible, to every part of the deed: but it is manifest, that the latter part of this covenant will be made wholly nugatory and inoperative, if the former be construed as an absolute covenant for quiet enjoyment against all mankind, on whatever grounds or causes they may found or derive title. For what would be the effect or use of superadding, that no statute or recognizance acknowledged, or judgment suffered by the defendant should operate to the plaintiff's disturbance, if the former part of the covenant stands absolute, and unqualified, that no lawful claim whatever should operate to his disturbance? But these latter words will be operative and important, if the construction which I before suggested

gested be adopted, and if these words be considered as specifying the ground of disturbance from which the stipulated enjoyment is to be free and clear. It may be said, however, that this construction, by thus giving effect to the latter qualifying words will fall into the same fault which it professes to avoid, by rendering inoperative the absolute words so much relied on, "or any person or persons whomsoever:" but if these words be coupled, as I think they may be, with the qualifying words superadded, it seems to me, that they will not be altogether inoperative; for the former part of the covenant, prior to the words in question, engages only that there shall be a quiet enjoyment, without let or interruption of the Defendant himself, his executors, administrators, and assigns; and if other words, descriptive of a larger class of persons, had not been superadded, it would have been at least doubtful, whether a disturbance, arising from an under-lease or rent-charge, or annuity secured by power of distress, or recognisance, or judgment, would have been provided for. But all these dangers are now effectually excluded; and the covenant stands, in effect, thus: that there shall be a quiet enjoyment during the residue of the term, free from, or indemnified against, all interruption, not only on the part of the covenantor himself, his executors, administrators, or assigns, but on the part of all other persons lawfully deriving any title or interest from the acts or defaults of the covenantor, his executors, administrators, or assigns. *Gainsford v. Griffith* is a strong case in favour of the plaintiff, but distinguishable from the present, on the ground, that the covenant for the validity of the lease, on which alone the Court proceeded, holding it to be an independent covenant, and such as could not be connected, in grammar or construction, with the following covenant, was, by itself, clearly absolute, containing no words whatever of qualification; whereas, here, the words of qualification, on which I proceed, I think, may, and

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and ought to be considered as part of the covenant for quiet enjoyment. The case of *Barton v. Fitzgerald* is also to the same effect as *Gainsford v. Griffith*. This case is also distinguishable from *Howell v. Richards*, which has been so much relied upon by the Plaintiff, because, the clause respecting incumbrances, (which forms the strength of the argument in favour of the Defendant here,) there formed the strength of the argument against him; that clause, then, containing words as general as the words which preceded, with one single exception, viz. the chief rent, which was not an act or default of the party, or of any claiming under him; this exception, therefore, confirmed the generality of all the other words. This being the case, it appears to me, that this is a covenant for a qualified, and not an absolute enjoyment, and, therefore, that the breaches are not well assigned.

BURROUGH J. The whole of the deed of assignment on which this question arises, is stated in the plea. The assignment recites the lease assigned, by which it appears that the Defendant held the premises for the remainder of a term of fourteen years, commencing from the 25th *December*, 1813. The contract between the parties is for the absolute purchase of the messuage and premises, and all his, the said *John Marshall's estate, term, and interest*, therein for the sum of 20*l.* There is nothing in the deed to shew (unless the covenant in question does so) that the assignor meant, at all events, to warrant that the lease should endure during the term. In questions of doubt, as to the construction of a covenant in a deed, the invariable rule is, that the construction must be made according to the intention of the parties to be collected from the whole deed. The rule laid down in *Gainsford v. Griffith*, and referred to in the argument, viz. "that if a restrictive clause be in the first or last part of a sentence, or at the beginning of

of the first, or at the end of the last sentence, which, in good sense, may be applied to one and the other, there it shall extend to both sentences, but, otherwise it is, if such sentence be placed in the middle of one or two sentences," is not the rule now observed. Mr. Serjt. Williams says, in his note to that case, speaking of the above rule, "It is questionable whether much regard would now be paid to this mode of construction." Such a rule has never been acted upon since I have been in *Westminster Hall*; on the contrary, it has been always said, that the construction must be governed by the intention of the parties, to be collected from the context matter, by a due attention to the whole of the deed or instrument. If the covenant on which the question, here, arises, is considered by itself, I am of opinion, that it is a qualified covenant. I feel it impossible to entertain a contrary opinion, without laying aside all the words which follow the words "*and that*." The particular covenant is for quiet enjoyment without the denial, &c. of *John Marshall*, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having, or lawfully claiming any estate, &c. Then follow the words "*and that*," &c.; now, in my judgment, these words over-ride the whole of the preceding part, and it is the same as if it had been repeated thus: "And you shall quietly enjoy without the denial, &c. of me, my executors, administrators, and assigns, or any other person or persons whomsoever, &c. free, &c. and acquitted, &c., or otherwise, by me, the said *John Marshall*, my heirs, executors, or administrators, kept harmless against all former gifts, grants, bargains, sales, &c. &c. made, done, or committed by me, or by or through my or their acts or defaults. This appears to me to be one entire covenant, and being so, it seems to me an inevitable legal consequence, that the latter part is restrictive of the former. Here it is fit to

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take notice of the case of *Howell v. Richards*. The deed is so stated in the report, that one does not immediately discover what the covenant was, but the moment the different parts of the covenant are put together, *cessat questio*. The covenant runs thus: "And likewise, that he, the said *R. Howell*, his heirs, &c. shall and may, from time to time, and at all times for ever hereafter, peaceably hold, and quietly enter into and have the said premises, without the lawful let, suit, &c. of said *J. Richards* and his wife *T. Richards*, and *D. Richards*, or any or either of them, their, or any or either of their heirs or assigns, or of or by any other person or persons whatsoever." Then, the report says, "concluding as stated in the declaration." The conclusion in the declaration, immediately following these words, is, "and that freely, and clearly, and absolutely acquitted, &c., or otherwise by the said *J. Richards*, &c. well and sufficiently saved, defended, and kept harmless and indemnified against all former and other gifts, grants, &c., jointures, dowers, &c. uses, trusts, &c., wills, statutes, &c. &c., save and except the chief rent due to the lord of the fee." So that the first part and the last part are equally general, save the exception of the rent in the latter part. But, an important observation arises on the exception of the rent; viz., could the purchaser take the first part of the covenant, and contend that the words "of or by any other person or persons whomsoever," would entitle the tenant to an action, if the rent was distrained for by the lord? I think, I may venture to answer my own question negatively; and then I put another question, why am I justified in saying no? The answer to that is, it is all one covenant, and the rent is as much excepted out of the first, as out of the latter part. But, there is another weighty consideration; we ought (if we can do so without violence to the words) to put such a construction on the instrument, as shall make the different parts

parts of the deed consistent with each other. There are three covenants in the deed. The first, that for and notwithstanding any act, deed, matter, or thing whatsoever, by him, the said *John Marshall*, at any time theretofore, made, done, or willingly or unwillingly suffered or permitted, *the indenture is a good and subsisting lease*, valid in the law, whereby to hold the premises during the residue of the term, and not forfeited, surrendered, or become void or voidable. The second covenant is that which is in question. It is inconsistent with the first covenant to construe this to be a covenant warranting the quiet enjoyment of the lease against all the world; and it is consistent with it to hold it to be a qualified covenant. The third covenant for further assurances is for himself, his executors and administrators, and all persons, who, during the term, shall have, or lawfully claim, any estate, right, title, trust, or interest, either at law or in equity, by, from, under, or in trust for him or them. This, also, extends only to himself and those who shall claim by, from, or under him. I need only further observe, that, if the second covenant has the effect contended for by the plaintiff, the first covenant is useless, It is consistent with the third covenant to hold the second to be a qualified and restricted covenant. On the whole, I am of opinion, that the judgment must be for the Defendant, because, I think, on the true construction of the particular covenant taken by itself, and aided by a due attention to the whole of the deed, the Defendant has covenanted against his own acts, and the acts of those who shall claim by or through, or with the acts, means, default, procurement, consent, or privity of him or his heirs, executors, administrators, and assigns.

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PARK J. As my two learned brothers who have preceded me, and, I believe, my Lord Chief Justice also, differ from me upon this occasion, I cannot but deliver

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my sentiments with great diffidence, and with great distrust of myself. I have this consolation, however, that my differing from them proceeds from no perversity of disposition, nor from an overweening conceit of my own judgment. I have turned this case in every possible way; I have listened to every argument; I have read and studied every case; and still, not being able to bring my understanding to a conformity with opinions which I so highly respect, I must deliver my own genuine sentiments, however erroneous the judgment which I have formed may appear to others to be. And, as I differ from my Lord Chief Justice and my brothers, I am afraid I must take up longer time than either of my brothers, as I am anxious to prove, that it is not without deep conviction that I differ from such high and learned authority. In the discussion of this case, I wish it to be fully understood, that I do not consider myself as giving an opinion in contradiction to the decided cases; but I hope to be able to shew, (at least, I have so convinced myself,) that my judgment is supported by them all but one. This case, which respects a leasehold estate, has been truly stated, at the bar, to depend upon the question, whether the covenant set out upon *Dyer* is a general or a restrained covenant. The words of it are these; (here the learned Judge read the covenant for quiet enjoyment,) and I admit, in the fullest terms, that were it not for these words, "without any the lawful let," &c. I should be most clearly of opinion with the Defendant; but, except in the case of *Broughton v. Conway* (a), which I shall comment upon presently, I do not find those terms in any covenant which has been held restrictive, and therefore with all the cases except that, I am most fully prepared to coincide. I enquired, with some solicitude, while this case was arguing; whether the

(a) *Dyer*, 240.

counsel could read these words, as sensible and intelligent, considered with reference to the former part of the sentence; but that they could not do satisfactorily to my mind. I enquired, also, if I could be furnished with any authority for rejecting these words altogether; but that, of course, could not be done. Now, I admit, that although the maxim, *verba cartarum fortius accipiuntur contra proferentem*, is to be qualified by this observation, that regard must be paid to the intention of the parties, as it is to be collected from the whole context of the instrument, still I dare not reject words which the parties have chosen to introduce into their contract. I know, that in all the cases, no word ought, if possible, to be rendered inoperative; and I humbly conceive, that by reading the deed as the Defendant wishes it to be read, the whole passage in question, consisting of upwards of four lines, must be wholly rejected or rendered inoperative, as a vain and idle repetition: whereas, as I propose to read it, each part is sensible and intelligible. It contracts for something distinct from what had before been provided for; and there is nothing in the language tautologous, or to be rejected as surplusage. But, it is said, it is impossible any man could so mean to contract, and, that the words introduced in the prior part of the deed or covenant shew, that the covenantor meant to restrain it to his own acts; "for and notwithstanding," &c. I would just observe, that those words are to be found also introducing the covenant in the case of *Howell v. Richards*. The covenant for title, and the covenant to convey, are necessarily restrained to the act of the covenantor, or his heirs, executors, administrators, or assigns, but not so the covenant for quiet enjoyment; and, therefore, in reason and good sense, the covenantor may well make a distinction, and say, notwithstanding any act done by him, &c. he has a good title, and has a right to convey; but the covenantee may, also, well

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insist, "It is not enough for you so to declare as to yourself; but I will, also, insist that I shall not be disturbed in my enjoyment by any person whomsoever." Lord Eldonborough says (a), "It is perfectly consistent with reason and good sense, that a cautious grantor should stipulate, in a more restrained and limited manner; for the description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect; but he may, at the same time, know that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it: He may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible." Mr. Justice *Le Blanc* also says, in another case (b), "I cannot say that an assignee would not require an absolute covenant for a valid lease, during the whole term bargained for, though he also required a covenant against the parties' own acts." Even Lord Eldon, in the case relied on by the counsel for the Defendant, and on which I also rely; I mean the case of *Browning v. Wright*, says, "*Prima facie*, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property; and in the case cited from that excellent book, the *Reports of Saunders*, made more excellent by a late edition, the estate was

(a) *Howell v. Richards*, 11 East, 642.

(b) *Barton v. Fitzgerald*, 25 East, 545.

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leasehold." All the muniments of a freehold estate, and every thing which can illustrate the title, is in possession of the vendor; but this is seldom the case with respect to leaseholds. With regard to many estates held in this town under the Duke of *Bedford*, and the Duke of *Portland*, it would be next to impossible to shew any thing but the lease itself: the vendors could not produce the muniments of their estates, deposited in the family chests of those noblemen. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property, which are not regarded in cases of freehold. I own, I can see no good reason why, on the one hand, we are to suppose, in order to get rid of a covenant, that it is very unlikely a covenantor (who has done so) should wish to undertake for all lawfully claiming; and yet, not to suppose, on the other, as Lord *Eldon* has done, that a covenantee was very likely so to insist. And why are we to reject a covenant in express words, evidently in favour of the assignee, merely because we think it improbable (that is, in other words, because, with our knowledge of the consequences, we would not,) that a man should so covenant? It seems to me, that an argument of no inconsiderable weight is to be drawn from the connecting particle in the covenant. After covenanting against the lawful let, &c. of the said *John Marshall*, his executors, &c., the covenantor says, "or any other person or persons whomsoever, &c." which must mean persons of another description than those he had before mentioned; for, if he had meant persons *ejusdem generis* with those already mentioned, he would have said, "and any person, &c." But, I think, the strongest argument is to be collected from the concluding words of this covenant, as contrasted with those to be found in the passage in question. In this branch of the sentence, the covenantor

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says, that he covenants for himself, his executors, and administrators or assigns; and adds, (having covenanted against the acts of all claiming under him,) "or any other person or persons whomsoever." But, when he covenants against former gifts, grants, &c., willingly permitted or suffered, he does so for himself, his heirs, executors, or administrators; and there he limits his assurance or covenant against all persons claiming under him; so that he evidently limits the responsibility where he means to restrain it, but leaves it general where he means it to be so; and the limitation of it in one place is, in my opinion, decisive, that he would have limited it in the other, if he had so intended. Therefore, though I have admitted, and again still admit, the general rule to be, that the general words of a deed are to be restrained by other parts of a deed, if the intent so to restrain them be apparent; yet, I think it would be of the most dangerous consequence, if the judges of the land were to permit themselves (which they have no right to do) to exercise vague conjectures about the hardship of cases, and to consider ingeniously what the parties must have meant, when the words used are clear and precise, admitting of no ambiguity at all; and when the mode, which the Plaintiff points out, gives to every branch of the covenant a clear and determinate meaning. This would be to make a new deed for the parties, not to pronounce upon the contract which they have made for themselves. But it is curious to observe, that the very words, which I have relied on (to shew, that when the covenantor meant to restrain his liability, he has done so by express words, having no ambiguity; but has left the words against "all persons whomsoever," when he meant to covenant generally,) are considered as decisive for the Defendant: for it is said he has shewn what he meant by the general words "all persons whomsoever," by immediately

mediately adding, "and that free and clear; and freely and clearly acquitted, &c." To which I answer, that the very same argument arose in the case of *Howell v. Richards*; for, in that case, as in this, the covenant begins with a restriction. It is then followed by the general words, as in this case, adding, as here, "and that freely and clearly, &c.;" and therefore, I do not feel that I can decide this case with the Defendant, without running in direct opposition to the case of *Howell v. Richards*; of which I most fully approve. There, as well as here, the general words were preceded and followed by words of restriction; but I have already said, in effect, the use of both shews that the covenantor knew the effect of both. I therefore conclude my observations on this part of the case, with the emphatic language of Lord *Ellenborough*, because, in my judgment, it applies most strongly to the case now before us, and is much more powerful than any I could introduce of my own: "Consistently, therefore, with that case, (meaning *Browning v. Wright*;) and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment, and which are entitled to more weight in this case, inasmuch as they immediately follow" (now, mark this,) "and enlarge the special words of covenant against disturbance by the grantors themselves; and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant, where no such general words occurred: the person using the general words could not forget that he had, immediately before, used special words of a narrower extent." And then his Lordship goes on to state, that if it were one covenant, it would be clear; (and here it is but one covenant,)

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covenant,) for he says, "If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant, addressed to a distinct object." This seems to me to be the very case. Now, as to the cases mentioned at the bar. The case of *Broughton v. Conway* (a), was a case of a covenant in a lease, whereby the lessor covenanted that he had done no act to impeach, but that the assignee might quietly enjoy, without let of him or any other person, &c. Taking it for granted that "any other person, &c." means any other person whomsoever, (and I admit it seems in all subsequent cases, and in the marginal note, to be so considered,) I must confess that to be an authority against the argument I espouse. But, I answer, this is the only case (in which those words are to be found) which has received this exposition. It appears to have been the opinion of two Judges only, and Mr. Justice *Brown* was strongly of another opinion; and a text writer of the present day truly observes on this case, that the insertion of those words is a circumstance which does not occur in any other of this line of cases, in all of which no word is rendered inoperative (b); for, where one covenant, or part of a covenant, is general, I am of opinion, that a subsequent limited covenant will not restrain the generality of the other covenant, unless an express intention to do so appear, or there be an inconsistency. With this observation, I choose to introduce the case of *Gainsford v. Griffith*. There the

(a) *Dyer*, 240.and *Purchasers*, 4th edition,(b) *Sugd. Law of Vendors* 469.

Defendant had covenanted, that it was a good and indefeasible lease, and that the Plaintiff should quietly enjoy during the whole residue of the term, without any let or disturbance of Defendant: a stranger enters, and breach is assigned, that, at time of making the assignment, the lease was not good and indefeasible. The Court held the breach was well assigned; for the first sentence is distinct, and contains a general covenant, not restrained by the latter sentence. Now, in this case, the latter sentence follows the first immediately, with the words "and that Plaintiff should quietly enjoy, &c." The authority of this case, in point of law, has never been questioned; and it was lately mentioned with much approbation, and relied upon by that eminent and very learned Judge, Mr. Justice *Le Blanc*, in *Barton v. Fitzgerald*. Lord *Eldon* feels the difficulty arising from it in giving the judgment of the Court in *Browning v. Wright*; for he states, that many of the cases depend on the distinction between freehold and leasehold property, and says the case quoted from that excellent book, the *Reports of Saunders*, (meaning the case of *Gainsford v. Griffith*,) was an estate of leasehold. That case, therefore, I consider as of unimpeached authority, and a very strong case in favour of the Plaintiff's claim; nay, it was a stronger case to decide for the absolute nature of the covenant, for the general words are not in it. The case of *Noble v. King* (a) was a case of executors, who had covenanted, as this Defendant has done here; for there were the words, "any other person or persons whomsoever." It was there contended, that executors could only be understood to covenant against their own acts, or the acts of persons claiming under them; but the counsel never seems to have thought, in that case, that it would not have bound a common covenantor

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against the acts of a stranger: but the case was not decided, for it went off upon another point. This brings me to the case of *Browning v. Wright*, which, it is supposed, is decisive in favour of the Defendant. First of all, I would say, if it were necessary to get rid of that case, that it is a case of freehold, and not of leasehold; a distinction pointed out, and the reasons for the distinction assigned, by Lord *Eldon*, in giving his opinion in pages 23. and 25. of the *Report*. In the next place, I would observe, that the question, there, did not arise upon the same branch of the covenant as that upon which we are now engaged. Here, it is upon that part of the covenant which covenants for quiet enjoyment; in that case, the covenantor only covenanted for quiet enjoyment, without the disturbance of him, or any other person or persons claiming under him. In the case of *Browning v. Wright*, the question turned upon the covenants for title, and having a power to convey; and as to those, one would say, generally speaking, that a man would only be inclined to covenant, that, as far as he knew, he had a good title, and that, notwithstanding any act done by him, he had a power to convey. But the main distinction between the cases, (and upon which I strongly rely,) is, that in the case of *Browning v. Wright*, the words, "or any other person or persons whomsoever," are not to be found; and therefore, as long as words are to have any force, I cannot withhold their natural and legitimate meaning. In short, I consider the case from 2 *Bos. & Pull.* so clear, that I conceive it only required to be looked at by the very learned Judges who decided it, to draw the conclusion which they did; and it was on the same principle on which that case was decided, and as not distinguishable from it, that I concurred most readily with my Lord Chief Justice and my Brother *Burroughs*, in *Roord v. Wilson*, in *Mich.* 59 G. 3. The covenant, there, was expressly and clearly intended to be a restricted covenant;

covenant; for, after stating that the covenantor covenants, that he has done no act to charge, incumber, or affect, it goes on, "and that for, and notwithstanding any such act, deed, matter, or thing, the said lease is a good, valid, and subsisting lease," namely, by the pronoun of reference "*such*," pointing at his own acts. Above all, in *Foord v. Wilson*, are not to be found the general words, "person or persons whomsoever." But, on the contrary, the words "person or persons," being once mentioned, they are immediately followed by the restrictive words "claiming or to claim under him or them." In the present case, on the contrary, as I have already observed, and in the branch of the covenant we are now engaged in, we have the general word "whomsoever;" but, in the latter branch of the covenant, the covenantor adds the restriction "claiming, or who shall thereafter claim the premises, or any part thereof, by, from, under, or in trust for him or them:" shewing most clearly that he understood the distinction; that he used the words generally, where he meant the covenant to be general, and restrictively, where he meant that the covenant should be restrained. The only remaining case, to which I shall call the attention of the bar, is that of *Howell v. Richards*; and, really, that is so much in point, that I cannot distinguish it. The Judge who delivered the judgment in that case was Lord *Ellenborough*, after time taken to deliberate, assisted in those deliberations, at that time, by the Judges *Grose*, *Le Blanc*, and *Bayley*; and the Court held, most clearly, that, (although we find the words there, as here, "for and notwithstanding any act, &c., done by them, or any of them (the releasors)," to the contrary,") they had a good title to convey; and also that they, "for and notwithstanding any such matter or thing as aforesaid," had good right and full power to grant; yet, that those restrictive words did not restrain the general words, "and likewise, that the releasee should

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should peaceably enter, hold, and enjoy, the premises granted, without the lawful let or disturbance of the the releasors, their heirs, or assigns, or for or by any other person or persons whomsoever." In this case, too, it was a case of freehold; and they had before them the case of *Browning v. Wright*; and the Court thought they could hold; that the generality of the covenant for quiet enjoyment was not restrained by the qualified covenant for good title and right to convey, in perfect consistency with the case of *Browning v. Wright*. But how could they do so? For this plain reason, because of those general words, which are also in this case, but which are not in the case of *Browning v. Wright*, though, in all other respects, it is precisely the same. But, it is said, the intention was there apparent that the releasor meant to take all the charge upon him, because he excepts what he does not mean to bear, namely, the chief rent, and shews that he meant to remain liable to every thing else. I think it may be said, if we have an accurate account of the judgment, which no doubt we have, this circumstance forms no ingredient in it. It is not even hinted at, and is only mentioned by Lord *Ellenborough*, in stating the record. And I think I may venture to state, without fear of contradiction, that, if ever there existed a judge who luminously and perspicuously stated the grounds of a written judgment, what he did, and what he did not rely upon, that noble, very learned, and excellent person, was the man; and, therefore, it is impossible ever to mistake his meaning, though you may happen not to come to the same conclusion. I most perfectly coincide in that judgment. I am, therefore, of opinion, that the covenant for quiet enjoyment, in this case is not, in point of necessary construction, to be restrained in the manner contended for by the Defendant; and consequently, in my view of it, there ought to be judgment for the Plaintiff,

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DALLAS C. J. The question in this case arises on the covenant for quiet enjoyment, namely, whether it is confined to the acts of the covenantor, and those claiming under him, or applies to the acts of all other persons of any description whatsoever. And in this, as in every similar case, it is a question of intention to be collected, not merely from the words of any one covenant, but by comparing all the covenants each with the other, so that the construction be made on the entire deed; and this, without reference to the order in which the covenants are found. In the present case, the first covenant is for a good and valid lease, notwithstanding any act done by the covenantor, or by those who may claim under him to the contrary. Next comes the covenant, on which the breach is assigned, viz. the covenant for quiet enjoyment, and it is for quiet enjoyment against the covenantor, his heirs, executors, administrators, and assigns, and, if it stopped here, it would be clearly restrictive; but these words are added, on which the difficulty arises, "or any other person or persons whomsoever." The clause of indemnity follows; and it is "to keep harmless and indemnified against all acts done by the covenantor, or those claiming under him;" dropping the words in the covenant for quiet enjoyment, viz. "against the acts of all persons whomsoever." Lastly, comes the covenant for further assurance; and here again, the words "or any other person or persons whomsoever" recur, but again limited to the covenantor and his representatives, and any person claiming under him or them, so as to be, again, clearly restrictive in the sense in which I understand them. Every case of this sort must contain covenants apparently, or, often, really inconsistent; for, it is, only from such inconsistency, that the case arises; and it is doing nothing towards solving the difficulty, to take the words of any separate covenant. The rule is, that, if to give to words what

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what might seem to be their meaning, if taken by themselves, would be inconsistent with the general purview of the deed, as to be extracted from all the covenants, or, to express it differently, as the evidence of intention may appear, on the whole, so each particular covenant must be construed with respect to the deed in question. One would naturally suppose, that in covenanting for the validity of the lease, the lease being the subject to be assigned, the covenantee would stipulate in terms of as extensive meaning as possible, if the parties so meant; but the covenant in question is restrained to the covenantor, and his heirs or assigns. But it is asked, if nothing more were meant, why, in the covenant which immediately follows, are words introduced, which, of themselves, import a great deal more? and this, certainly, raises the difficulty. Are these words, because the last, to extend the former words, or are the former special words to restrain the subsequent general words? or if the subsequent general words are to be considered as extending the former restrictive words, are the subsequent restrictive words, into which the deed again relapses in the covenant for indemnity, to narrow the general words in the covenant for quiet enjoyment? And what are we to say, when we find that the latter special words are again followed by the general words, in the concluding covenant for further assurance, and there, again, restrained to acts done by them claiming under the covenantor? As far as light is to be derived from cases, that of *Browning v. Wright* contains a reference to most of those to be found. As to the case itself, it does not seem to me to touch the present; *there* the covenant for title was qualified, so was the clause of warranty: so the stipulation for indefeasibility of estate, and, lastly, such was the covenant for quiet enjoyment: nor was even the covenant for right to convey general, for it was only to convey in manner aforesaid, connecting,

ing, therefore, by words of reference, the individual covenant with the preceding restrictive covenants, and equally throwing light on the covenants which followed, taking all the covenants together, with or without reference to the order in which they stood. In *Gainsford v. Griffith*, the covenant was general, that the lease was indefeasible, differing, therefore, from this, in which it is special and limited; and the only question appears to have been, whether, the special words in the covenant for quiet enjoyment could restrain the general words in the former covenant, which the Court held they could not. *Broughton v. Conway* does not seem to me to apply. The covenant was, that the party had done no act to impeach the property in question, *but that* the assignee might quietly enjoy without let of him, or of any other persons; and the words *but that* were considered as dependent on the precedent matter, and no new matter or sentence; and the ground of decision was the precise form of the particular covenant. Without dwelling on intermediate cases, which does not appear to me to be necessary, I shall now come to the case of *Howell v. Richards*, and examine how far it is similar, and in what respects it differs from the present. The covenant for title was of a limited nature like the present; so, as to right and authority to convey; the covenant for quiet enjoyment was in the same terms as the present; and, the last covenant being general in its terms, the question arose, whether it was restrained by the precedent special clauses? and thus far the two cases exactly agree. But now the difference arises; and it is this. In *Howell v. Richards* the covenant to indemnify following that for quiet enjoyment was in the most comprehensive terms, with a single saving as to a chief rent, and on this, in giving the judgment of the Court, Lord *Ellenborough* greatly relies; but, here, the covenant for indemnity is special, and confined to acts

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done by the covenantor, or those claiming under him. As applied to the same subject, the special and restricting covenant follows the general covenant. And this makes the reasoning in *Howell* and *Richards* apply the other way. "The person using the general words" (which were the last words) said Lord *Ellenborough*, "could not forget that he had, immediately before, used special words of a narrower extent." Apply this to the present case, in which special words follow the general words, and, therefore, if the general words in *Howell v. Richards*, because the last words used, were to enlarge the special preceding words, the special, because the last used, should restrain the general; so that, if the order in which they are found, and the words last uttered by the party be to make, in any respect, the distinction, the case of *Howell v. Richards*, instead of being an authority for the Plaintiff, is an authority, as far as reasoning goes, in favour of the covenant being restrictive here; nor does this observation merely attach upon what is said in the judgment given, but it seems to me, so to apply on the sense and reason of the thing; at all events, in the circumstances belonging to each, the cases differ. The covenant for further assurance, the last in the deed, is clearly restrictive. The words occur, as in the covenant for quiet enjoyment, "all and every other person or persons whomsoever," preceded by the words "his executors and administrators;" and, in a subsequent part of the same covenant, these words are explained and qualified by the words "in trust for him or them," that is, the covenantor or his assigns; shewing, that in the former covenant, they were made use of in the same sense. Without rejecting, therefore, the words, this will give a meaning consistent with all the other covenants, shewing, that the covenantor meant only to covenant against his own acts, and those claiming under him. On the whole, therefore, when I find

find the deed begin and end with a restrictive covenant, when I find intermediate restrictive covenants, when I find, in the very clause in which the supposed general covenant occurs, that it is immediately preceded by a restrictive covenant; when I further find, that to suppose the general words were added to enlarge the restrictive words would be inconsistent with special restraining words which immediately follow, and give them a sense different from what they bear in a subsequent covenant; — putting all these circumstances together, and having to assign a meaning to the general words, not merely by themselves, nor even as they follow special words, but as they themselves are in every subsequent covenant followed by restrictive words; if there were more of difficulty in this case, than appears to me to belong to it, still, on the whole, I should be of opinion, that the general intention is clear; and in favour of a clear intention, that is, such intention to be collected from the whole deed, I should consider, that these words might even be rejected if necessary. But this I do not feel any necessity to do, because I think “all persons whatsoever,” must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them; and that they are in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words, reference being had to their special nature, and as such, ranging under known rules of construction, and to be explained and applied as I have already stated. Agreeing, therefore, with my Brothers *Burrough* and *Richardson*, the judgment must be for the Defendant.

Judgment for the Defendant accordingly.

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GEORGE WINTER v. EDWARD WHITE.

A., B., C., D., E., and F., partners in trade, submitted to arbitration differences which had arisen between them in their trade.

A., B., and C., gave a joint and several bond to *D., E., and F.,* conditioned for the performance of an award, and *D., E., and F.,* gave a similar bond to *A., B., and C.* The arbitrator awarded, among other things, that *A.* should pay a sum of money to *B.* *A.,* having sued *B.* on the award, held, (*Richardson J. dissentiente,*) that *A.* might recover the sum awarded to him.

DEBT on award. The declaration stated, that before the time of making and executing the bonds, and making the submission thereafter mentioned, *George Winter* (the Plaintiff), *W. Munton*, and *Edward White* (the Defendant), *Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon* had been concerned together in trade as ship owners and coal merchants, and that divers differences and disputes had arisen, and at the time of making and executing the bonds, and making the submission thereafter mentioned, were depending between the said *George*, and *Edward*, *William*, *Joseph*, *Thomas*, and *Samuel*, with respect to such trade and dealings, and the accounts relating thereto and thereupon; and whilst such differences and disputes were depending, the said *G. Winter*, *E. White*, and *William Munton*, by a bond, bearing date the 7th November, 1815, became jointly and severally bound to *Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon*, in the penal sum of 2000*l.*; and that the said three obligees, *Joseph*, *Thomas*, and *Samuel*, by another bond of the same date, became jointly and severally bound to the said *George*, *Edward*, and *William*, in the penal sum of 2000*l.*, whereby, after reciting that those six persons had been, sometime then ago, concerned together in trade as ship owners, and that divers differences and disputes had arisen and were then depending between

In the recital of a bond, the differences were said to exist "between the above bounden *A., B., and C.,* and the above-named *D., E., and F.*" The declaration, in setting out the bond, laid the differences to exist between *A., B., C., D., E., and F.*: Held, that this was no variance.

the

the said *George, Edward, William, Joseph, Thomas, and Samuel*, with respect to such trade, and the accounts relative thereto; and further reciting, that it had been agreed between them all, that all accounts relative to the trade, and all differences and disputes between the parties with respect to the same, should be referred to the award of *Benjamin Kidman* and *William Wood*, arbitrators indifferently named and appointed by and on the several parts and behalfs as well of the said *George, Edward, and William*, as of the said *Joseph, Thomas,, and Samuel*, to arbitrate all such accounts, and all claims, differences, and disputes with respect thereto, the said bonds were respectively conditioned (amongst other things) in all things well and truly to stand to and obey the award to be made by the said arbitrators, of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of and concerning all actions, cause and causes of action, suits, claims, damages, and demands whatsoever, then or at any time theretofore had, made, moved, brought, commenced, or depending by or between the said parties or any of them, or any other person or persons claiming to be a creditor or creditors upon the said parties, or any of them, with respect to all, or any of the matters thereinbefore agreed to be referred; then followed agreements concerning the expences of the arbitration, and the examination of witnesses, production of papers, &c.; and the Plaintiff then averred, that the above named arbitrators made their award, and thereby, amongst other things, awarded, that the Defendant should, at a certain time and place in the declaration mentioned, pay to the Plaintiff the sum of 156*l.* 12*s.* 6*d.*, being the balance which they found to be due from the Defendant to the Plaintiff, on account of their said partnership dealings, including therein one sixth part of the expence of the reference and award, and after

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they had allowed to the credit of the Defendant the sum of 81*l.* 19*s.* 3*d.*, the amount of his bill for work done for the partnership concern, together with interest upon the said sum of 156*l.* 12*s.* 6*d.* from the date of their award, and averred notice to the Defendant, and a breach in non-payment. Then followed a count for 91*l.* 12*s.* 6*d.* for goods sold and delivered. Plea, general issue, and issue thereon; there was also a notice of set-off.

At the trial at the London sittings in *Hilary* term, 1819, before *Park J.*, it appeared, that *Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon*, had given a joint and several bond to *George Winter*, *Edward White*, and *William Munton*, and that *G. Winter*, *E. White*, and *W. Munton*, had given their joint and several bond to *J. Hollams*, *T. Knott*, and *S. Pointon* conditioned for submitting to arbitration divers differences and disputes which had arisen and were depending between them with respect to their trade, and for the performance of the award that should be made. The recital and condition of the bond declared on, were as follows: "Whereas the above bounden *Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon*, and the above named *George Winter*, *Edward White*, and *William Munton*, were sometime ago concerned together in trade as ship owners and coal merchants; and whereas divers differences and disputes have arisen and are now depending between the above bounden *J. Hollams*, *T. Knott*, and *S. Pointon*, and the above named *G. Winter*, *E. White*, and *W. Munton*, with respect to such trade and the accounts relative thereto: and whereas it hath been agreed by and between the above bounden *J. Hollams*, *T. Knott*, and *S. Pointon*, and the above named *G. Winter*, *E. White*, and *W. Munton*, that all accounts relative to the said trade, and all differences and disputes between the said parties with respect to the same, shall be referred

ferred to the award, arbitrament and umpirage, final end and determination of *B. Kidman* and *W. Wood*, arbitrators indifferently named and appointed, by and on the the several parts and behalfs, as well of the above bounden *J. Williams*, *T. Knott*, and *S. Pointon*, as of the above named *G. Winter*, *E. White*, and *W. Munton*, to arbitrate, adjudge, and determine of and concerning all such accounts, and all claims, differences, and disputes with respect thereto. Now, therefore, the condition of the above written obligation is such, that if the above bounden *J. Hollams*, *T. Knott*, and *S. Pointon*, and each of them, their and each of their heirs, executors, and administrators, and every of them, do and shall, on his and their respective parts and behalfs, in all things well and truly stand to, obey, &c., and keep the award, &c., to be made by the said *Benjamin Kidman* and *William Wood*, of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of and concerning all action and actions, cause and causes of action, suits, claims, damages, and demands whatsoever, now or at any time heretofore had, made, moved, brought, commenced, or depending, by or between the said parties, or any of them, or any other person or persons whomsoever, claiming to be a creditor or creditors upon the said parties, or any of them, with respect to all or any of the matters hereinbefore agreed to be referred, so as such award, &c. be made in writing, and ready to be delivered to such of the said parties as shall require the same, within one calendar month next ensuing the day of the date of the above written obligation, then this obligation to be void, &c.”

It appeared, from the award, that the arbitrators, among other things, awarded, that the Defendant should (at a time and place mentioned in the award) pay to the Plaintiff the sum of 15*l.* 12*s.* 6*d.*, being the balance which they found to be due from the Defendant

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ant to the Plaintiff, on account of their partnership dealings, including therein one-sixth part of the expenses of the reference and award, and after having allowed to the credit of the Defendant the sum of 61*l.* 19*s.* 3*d.*, the amount of the bill for work done for the partnership concern. They also awarded, that if at any time thereafter, any monies should be recovered and received on account of a sum stated to be the amount of debts due to the partnership concern, and which then were considered as bad and doubtful, the same should be divided equally between the said G. Winter (the Plaintiff), E. White (the Defendant), W. M., J. H., T. K., and S. P. It also appeared, that there never were any disputes between the Plaintiff, the Defendant and Munton, taken collectively, and Hollams, Knott, and Pointon, taken collectively, but that the disputes were between the six parties severally, in relation to a partnership concern which they had carried on together. It did not appear that there was any rule of Court touching the award or submission. The counsel for the Defendant objected, among other things, first, that there was a variance between the bond produced in evidence and that recited in the declaration; secondly, that the action could not be sustained by the Plaintiff, who was with the Defendant, and another co-obligor, in one of the bonds, and with the same persons a co-obligee in the other. The learned Judge reserved the points. Upon these grounds,

Bosanquet Serjt., in Hilary term, 1819, had obtained a rule nisi to set aside the verdict for the Plaintiff, and enter a nonsuit, or to arrest the judgment. The cause was twice argued, once in Hilary term, 1819, by Lens Serjt., for the Plaintiff, and Bosanquet and Taddy Serjts. for the Defendant, and again in this term by Taddy for the Defendant, and Lens for the Plaintiff.

For

For the Defendant it was thus argued. A non-suit must be entered if the bond is mis-recited, and such mis-recital exists; for, it is said in the declaration, that differences existed between all six of the partners, whereas in the bond, it is said, the differences existed between three and three. Further, this action cannot be supported, because the bond which contains the submission to arbitration, authorises only a reference of matters in dispute between three and three of the parties, and not between all the six severally: such a reference would have been endless. The Plaintiff and Defendant are co-obligors in one of these bonds, and there never was an instance of one co-obligor suing the other on the bond, by which both are bound to another. There exists, therefore, no sufficient cause of action between the parties. In order to sustain debt on an award, two things must concur, a submission and an award; and the extent of the arbitrator's power must appear from the submission. It is material, therefore, to shew how the submission was made. In the present instance, it was made by mutual bonds between parties of three and three, which bonds recited that differences had arisen, and were depending between one party of three and another party of three; though the recital of the bond set out in the declaration states, that differences had arisen, and were depending between all the six. The condition of a bond may, perhaps, be considered an agreement in equity, but there is no instance of such a doctrine being held at law. It may be urged, however, that this action is not brought on the bond, but on the award; but that comes round to the same thing, for the award can only avail so far, as it is supported by and agrees with the submission. This is, indeed, an action on an award, but in all actions on awards the submission must be stated. The question, in substance, must terminate in this, whether one of

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two co-obligors can sue the other on the bond, by which they are bound to another?

For the Plaintiff it was thus argued. The Plaintiff admits, that there are no instances, in which one of two obligors has been permitted to sue the other, on the bond entered into by them both; but the obligor here does not sue on the bond, he sues on a totally distinct cause of action; and the question, here, is, whether these bonds are not, at least, evidence of a submission. It was the clear intention of the parties to submit all matters in difference between all or any of them; the latter words (which are found in the bond) grammatically as well as reasonably, extend to all disputes between each of the individuals with any other; there are no accounts between the three and the three, there is no dispute between the three and the three, and no award could be made between the three and the three. The bond, indeed, is inartificial, but the parties have another remedy; for, the submission does not depend entirely on the effect of the bond or penalty, the intention of the parties being apparent from the recital of the bond. It cannot, therefore, be said, that there is any variance in the pleadings. The whole statement in the declaration amounts to a plain though inartificial expression of the real state of the case; namely, an intention in all the parties concerned to submit to arbitration, not for the purpose of having an award, as between three and three, but that each individual should have his respective concerns arranged. The bond may be laid out of the question; and though it may be difficult to see in the bond, what was the intention of the parties, yet, when that has been ascertained, an action may be brought to enforce the award, and enough appears to sustain it.

In reply, it was urged, that there being no rule of Court between the parties, nor any stated in the declaration, the submission could only be taken from the bond.

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The whole of the Defendant's argument was, that the submission was limited by the nature of the instrument, and that that instrument was a bond. The parties might have submitted in another way, but they had not done so.

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Cur. adv. vult.

The Judges now delivered their opinions *seriatim* :

RICHARDSON J. (after stating the pleadings and the facts of the case.) It seems to me, that, in this case, the judgment ought to be arrested. The question is, whether any contract or cause of action exists between the Plaintiff and the Defendant, and it seems to me that none appears upon this record. There certainly are authorities to shew, that where, in pursuance of bonds of submission, an award for the payment of money is made, the party is not bound to sue upon the bond, but that an action of debt may be maintained upon the award. From *Freem.* 410. (anon.), *Jenkinson v. Allison, Freem.* 415., and *Dilkey v. Polhill, Str.* 923., it appears that such an action is maintainable. But I am not aware of any case, in which it has been held, that an action of debt will lie upon the award, where an action would not also lie upon the bond of submission. What is the nature of an award? An award is a decree made by a Judge or Judges, deriving authority from the choice of the parties. The power of such Judge or Judges to decide, and the duty incumbent on the parties to obey the decision, arise solely from the contract of submission. In order, therefore, to support an action on an award, the contract of submission must be proved. The award itself is no evidence of contract, but, when made in pursuance of a proper submission, then the parties may be said to have contracted to pay that, which the arbitrators, so empowered, have by the award directed to be paid. The submission,

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submission, then, being the basis of the action, must be examined, for the purpose of seeing what the contract is, and by whom and with whom it is made. In the present case, there is no evidence of submission, excepting two bonds; by one of which *Winter* and *White*, and one *Munton* became jointly and severally bound to three other persons, and by the other bond, those three persons became jointly and severally bound to *Winter*, *White*, and *Munton*. Unless, therefore, there can be inferred from the conditions, some other and different contract from that which is expressed in the obligatory part, it cannot be said, that by these bonds, *Winter* and *White* are contracting parties with each other. They are either joint and several obligors, or joint obligees. But to hold, that the condition can introduce any new and different contract, seems to me to be extending the condition beyond its proper office, which is to operate as a defeazance upon the obligation before entered into, not to create any new duty, or extend that which the obligor has already taken upon himself. In cases where *A.* and *B.* have jointly entered into a submission of arbitration with *C.*, an award for *A.* alone to pay money to *C.* has been objected to, but holden good by the Court, *Athelston v. Moon*, *Com. Rep.* 546. *Carter v. Carter*, 1 *Vern.* 259. But the authority which seems to me to come nearest to the present case, is in *Brooke's Abridgment*, tit. *Arbitrement*, pl. 44. There, after citing the *Year Book*, 2 *R.* 3. 18. (where it was held by three justices in the Exchequer Chamber, that if *J. N.* and three others put in award of *W. P.* all actions and demands between them, the arbitrator has authority to decide all joint matters between them, and all several matters also,) he adds, "Yet it seems clear, that the arbitrator has not authority to determine or arbitrate matters between the three, for they are one party against the fourth, but he may determine

determine between any one of the three and the fourth? This distinction appears to me to be founded in reason and principle; for, otherwise, a different effect might be given to the submission, and a contract might be let in different from that, into which the parties by their submission entered.

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BURROUGH J. This is a motion in arrest of judgment. The objection made on the part of the Defendant is, that the action of debt on the award, cannot be maintained by the Plaintiff, who is, with the Defendant and another, an obligor, in one of the bonds; and with the same persons, an obligee in the other bond, mentioned in the declaration. It has been contended, that the matter, on which the arbitrators have decided, was not submitted to their decision. In the first place, therefore, it becomes necessary to see who are the parties, and what is the form of the submission. The parties to the submission are the Plaintiff, the Defendant, and one *William Munton*, and *Joseph Hollams*, *Thomas Knott*, and *Samuel Pointon*. The form of the submission on the part of the Plaintiff, the Defendant, and *Munton*, is a bond, by which they became jointly and severally bound to *Hollams*, *Knott*, and *Pointon*, in the penal sum of 2000*l.*; and on the part of *Hollams*, *Knott*, and *Pointon*, they, by the other bond, became jointly and severally bound to the Plaintiff, Defendant, and *Munton*, in the like sum. So that by these bonds, all six are severally bound. The next thing to consider is, what is submitted to the arbitrators? The matter submitted appears in the recitals and in the substance of the conditions. The recitals are, that these six persons, (naming them,) were some time then ago concerned together in trade and dealings as ship owners and coal merchants, and that divers differences and disputes had

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had arisen and were then depending between them (naming them all) with respect to such trade and dealings, and accounts relative thereto; and, that it had been agreed, by and between them, that *all accounts* relative to the said trade and dealings, and all differences and disputes between the said parties with respect to the same, should be referred to *Benjamin Kidman* and *William Wood*, arbitrators, as well on behalf of the Plaintiff, the Defendant, and *Manton*, as of the said *J. Hollans*, *T. Knott*, and *S. Pointon*, to arbitrate of and concerning all such accounts and all claims, differences, and disputes in respect thereto. It appears, then, by the recital, that all accounts relative to the trade and dealings of the six partners in their late trade and dealings as ship owners and coal merchants, and all differences and disputes between the said parties with respect to the same, were to be referred. Then follow the conditions, and they are, that as well the said *George* (the Plaintiff), *Edward* (the Defendant), and *William*, as the said *Joseph*, *Thomas*, and *Samuel*, shall obey the award to be made, "of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of and concerning all actions, cause or causes of action, suits, claims, damages; and demands whatsoever, then or at any time theretofore had, made, moved, brought, commenced or depending by or between the said parties, or any of them, with respect to all or any of the matters then or before agreed to be referred." These two bonds, with their conditions, in effect, form one agreement of submission. To avoid a great expence it is effected by two bonds. Each of the bonds are joint and several; and properly so, because the matters are joint and several. The trade and dealings were a joint concern; but, when their accounts are to be wound up, their interests are not. It appears, then, on the face of the declaration, that each has agreed to the reference,

reference, and that each has a several interest in the subject-matter of the reference. From the nature of a partnership, the accounts must be between all, and between every of them; and therefore they agree, that the matters to be decided are accounts and differences, *due between them or any of them*. The third matter to be considered is, whether the award of the arbitrators is authorized by these bonds and conditions. They have awarded, that the Defendant, one of the obligors in one of the bonds, shall pay to another of the obligors in the same bond, a sum of money, which they find to be the balance due from the Defendant to the Plaintiff, on account of the said partnership dealings, including a sum for costs. Each of the parties to the bonds had agreed, that they should arbitrate respecting all accounts of the co-partnership: they could not do this, without taking into their consideration the account of each of the partners, as it respected *each and every of them*. Suppose, on the result of the whole account, there had been 600*l.* to be divided between all six, and the three obligees in the bond, in which the Plaintiff was one of the obligors, had each received 100*l.*, and *William Munton*, the third obligor, had also received 100*l.*, and the Defendant had received 200*l.*, and the Plaintiff had received nothing; what rule of law or equity could prevent the arbitrator from awarding that the Defendant should pay the Plaintiff 100*l.*, he having received 100*l.* more than his share, and the Defendant, entitled to 100*l.*, having received nothing? The case of *Carter v. Carter*, 1 *Vern.* 289., seems to me to have a strong application to this case. There, *Ralph Carter* and *John Dawson*, the executors of *Richard Carter*, of the one part, and *Anne*, the widow of the said *Richard*, of the other part, submitted themselves to an award, and entered into a recognizance for the performance of it. The arbitrator, after reciting that *Richard*, the testator, had acknowledged

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acknowledged a judgment of 100*l.* to the said *Ralph*, and that *Anne Carter*, the terre-tenant, was, by reason thereof, disturbed in her jointure, awarded, that the said *Ralph* should acknowledge satisfaction upon the judgment. In a *scire facias* on the recognizance, the breach assigned was, that satisfaction was not acknowledged on the judgment. Mr. *Holt* contended, that the award was larger than the submission; for, when *A.* and *B.* of the one part, and *C.* of the other part, submit to an award, that is a submission of the differences which *C.* had with *A.* and *B.* jointly, or with either of them severally; but does not submit the differences between *A.* and *B.* Now, in this case, *Ralph* had two remedies, one against the terre-tenant, and another against *Dawson*, as executor of *Richard*, to follow the personal estate; and, therefore, the award ought not to have been, that satisfaction be acknowledged on the judgment, but only that the land should be freed and discharged from the judgment. But, after hearing Mr. *Pollexfen* on the other side, the Lord Keeper and Mr. Justice *Levinz* were both of opinion, that the award was well made, and the breach well assigned; for that all the parties concerned in the judgment were before the arbitrator, and *Ralph*, who made the submission, had the whole power of the judgment in him, and therefore ordered judgment to be entered on the *scire facias*, unless better cause was shewn to the contrary. The objection, in this case, was, that the reference being between two of the one part, and one of the other part, the arbitrator had no authority to award on the matter which, immediately, was between these two; but, because the person on the other part was disturbed by it, and they were all parties, the award was held good. Now, here, all six are severally parties to the reference, and all severally interested in the subject-matter of the reference; and the arbitrators were authorized to settle all the accounts and differences relating

relating to the partnership depending between them, or any of them. If the award is well made, I cannot discern any objection to this action: it is an action of debt on the award, for the sum awarded to be paid by the Defendant to the Plaintiff. The action is not founded on a contract. Debt lies on the award, because the subject-matter of reference by the award *transit in rem judicatum*. The award creates the duty: the party is not driven to an action on the bond. I conceive it is not essential to an action on an award, where the submission is by bond, that the Plaintiff should be able to recover the same sum by an action in the bond. I am sure it is no where so decided. The award is in the nature of a judgment or a decree: the bonds, and their conditions, are only to be looked to, in order to see whether the matter awarded is authorized by the agreement to submit. Each of the six has agreed to a reference of the accounts relative to the partnership. By the conditions of the two bonds, they are to perform the award generally, respecting the accounts, differences, disputes, &c. between the parties, or any of them; and, if it was necessary so to contend, which I conceive it is not, I think an action might be brought on the bond in which the Plaintiff is obligor, by the obligees in that bond, against the Defendant, for not paying to the Plaintiff the money awarded to be paid to him by the Defendant. I am of opinion, that the rule for arresting the judgment must be discharged.

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PARK J. It has been truly observed, that it is painful for the Court to give a judgment upon strict legal and technical objections against the real justice of the case; but one must ever be pleased, when, giving effect to what justice requires, will violate no rule of law. First, as to the motion for leave to enter a nonsuit, upon the ground of a variance between the bond proved, and

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that stated on the face of the declaration ; for that on the declaration, in reciting the condition, it is stated as if divers differences and disputes had existed between all the six : whereas, in the condition of the bond itself, it is stated as if the disputes had arisen between the three obligors in the one bond, and the three obligees, and not between the six. It is to be observed, that as the action, here, is not upon the bond itself, the stating it is only matter of inducement, which, I admit, it is necessary to do, in order to shew that the arbitrator had jurisdiction. But, it seems to me, that, here, it is stated with sufficient precision ; for it is true, that all six agreed to refer, and though three were bound to three, and were therefore in the bond obliged to be called the *above-named*, yet, as the whole six agreed that all the accounts should be referred, it seems to me no variance that they did not set out, in what way and form the parties were bound to each other. The main question is upon the arrest of judgment, because, it is said, the award is not justified by the submission. I admit an action could not have been brought on the bond by the present Plaintiff against the Defendant, because both are obligors, and one obligor cannot sue another ; but here the action is upon the award, which I admit, also, must be justified by the submission, and which, in this case, I contend, it is. What has the arbitrator done in this case ? He has taken the partnership account, and in the course of that, finds, that the Defendant owed the Plaintiff a given sum of money, and the Plaintiff owed the Defendant a given sum, and deducts the one from the other, and awards the balance to the Plaintiff, to whom the larger sum was due. Is not this most equitable and just ? It is difficult to point out any other mode by which a partnership account could be taken. It consists, generally, either of the sums due from or to the partnership to and by the world at large ; or of

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monies received more than the share, and monies advanced more than the share amongst the partners themselves. Was this latter what they meant to refer? Look at the declaration, and the conditions of the bonds as recited in the declaration, to learn the intention of the parties: "That whereas the six parties had been concerned together in trade and dealings as ship-owners and coal-merchants, and divers disputes and differences had arisen, and were then depending between them with respect to such trade and dealings, and the accounts relating thereto; and thereupon, heretofore, and whilst such differences and disputes were depending, they entered into bonds, Plaintiff, Defendant, and *Muntan*, to *Hollams*, *Knott*, and *Pointon*, binding themselves jointly and severally to abide the award." The condition is then recited, that the six were some time ago concerned together in trade, and dealings as ship-owners and coal-merchants, and that divers differences and disputes had arisen and were then depending between the said six, with respect to such trade and dealings, and the accounts *relative thereto*; and reciting, that it had been agreed by and between the six, that all accounts relative to the said trade and dealings, and all differences and disputes between the said parties, with respect to the same, should be referred, &c. Then the bond is conditioned to stand to obey, &c. the award of and concerning the said trade and dealings, and all accounts, differences, and disputes, *relative thereto*, and of and concerning all actions, &c. by or between the said parties, *or any of them*. Now it does seem to me, that words can hardly be conceived stronger than these, to prove the clear intent of the parties to refer every thing relative to their former trade, and all accounts relative thereto. But the Defendant's contention would go to shew, that when he used the term "all accounts," he only meant "some accounts," and not all. What were they? It could not

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be any accounts *prospectively*; for the condition expressly speaks of time past, and time past only, that they *had* been in partnership, and that differences *had* arisen respecting the account. But, it is said, it was only intended, that the arbitrator should take the joint account with all the world (though that is no where referred), and the account which might subsist between the three on the one side, and the three on the other. But, I should be glad to ask, as was asked by my Brother *Lens*, how could there be a joint account between the three and the three? and to this no satisfactory answer is or can be given. If, then, this was only to take the accounts between the three and the three, and there can be no such accounts; and, if the public accounts of the partnership with their customers, debtors, or creditors, are not in question, the whole of this proceeding is merely waste paper, nugatory, and void. But it becomes the Court to see, if they cannot find out a sensible meaning for the parties, consistently with the language used, and not contravening any rule of law. In all cases of arbitration, the intendment is to make peace, and to put a perfect end to the controversies that may be in question; and, therefore, there is to be a reasonable construction. Now, here, the only controversies must have been the accounts relative to the trade and dealings *inter se*. Nothing is more common, than that one partner draws out a larger sum for his family, than another. One partner of the six is, perhaps, a glazier on his own account, and he works for the trade; another is a baker, and supplies the ship with bread. Accounts *hujusce generis* must have been the object of reference, for no other could. How could it be intended to confine it to three and three, when the words "between the said parties or any of them" are found? The words "or any" must mean the parties, or any of them individually; if it had been intended conjunctively,

ively, it must and ought to have been differently expressed. No authorities were referred to at the bar, and, certainly, there is great paucity of decision on this point. Indeed, there is no precise authority, probably, because before this, there never was so bungling a piece of machinery introduced, with a view to settle differences; for I will not suppose, that any professional man meditated the great evil, that this attempt to arrest the judgment is calculated to produce, more especially if the attorney applying for this rule himself prepared the instruments. But the researches of the Court have proved, that authorities as to the principle are not entirely wanting. In *Butler v. Wigge*, 1 *Saund.* 65., which I quote not for the case, but for the principle, which is well expressed, the action was debt on the bond, and there, the Court held the condition good, though not so properly expressed as it should be; but, they said, that any words, by which the intention of the parties can appear, are sufficient to make a condition of an obligation. The construction contended for by the Plaintiff does not seem to me an *iota* stronger than the construction put in the following cases. In the 2 *R. 3.* 18 B., in the year books, is this case. By *Hussey, Fairfax, and Catesby*, Justices in the Exchequer Chamber. If three and another man submit themselves to the award of one, of all debts and demands between them, who hath power by this to make an award of matters which all the three have against the fourth, or any matter which any one of the three hath against the fourth, or any matter which any of the three hath against the other; and if he award that one of the three shall give something to the fourth, and that the other two shall go quit; and where he finds that the fourth owes to one of the three twenty shillings which he awards to be paid to him, and that he owes nothing to the other two, and doth therefore award that he shall be quit against them, this is a good award. Justice

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Houghton quotes this case with approbation in 3 *Bulstrode*, 65., and adds, "Being in case of an arbitrament, which is by intendment of law to make peace, and to put a perfect end to matters in controversy; and, therefore, in maintenance of such awards, a reasonable construction is to be made of them." Now except for the words, "or any matter which any of the three hath against the other," which may admit of doubt, and which, if they were supposed to go the length of this case, would be, I admit, a mere *obiter dictum*, I only quote it for the principle and not for the case itself. In 1 *Roll's Abridgment*, 246. pl. 5., it is said, "If *A.* and *B.* of the one part, and *C.* of the other part, submit themselves to the award of *J. S.* of all matters between them, *J. S.* may make an award of any matter between *A.* solely and *C.*, though *B.* has nothing to do with it, for the submission shall be taken distributively. Adjudged on demurrer between *Arnold* and *Pole*, *Mich. 9 Car. in B. R.*" Now upon that case I should have said, and I think, with much shew of reason, that the matters referred were only those between *A.* and *B.* jointly with *C.*, and not those which *A.* had in his own right with *C.*; and yet the Court went from the words used, and held it to be an authority for a distributive award. But this case in *Roll* has been supported, and put out of all doubt by the case of *Athelston v. Moon*, and *Willis*, in *Com. Rep.* 547. On a motion for an attachment for not performing an award made pursuant to a rule of Court, it was objected, that the award was void, for the submission was of all matters between the parties (without saying between them or either of them), so as the award be made of the premises by such a day. But the award is, that the Defendant *Willis* should pay a sum of money due by him to the Plaintiff. As, therefore, the submission must be understood of joint demands which the Plaintiff had against the Defendants, this award of a several debt from one of them only,

only, is not within the submission. But it was not allowed; for a submission of several persons, of all matters in difference between them, imports a submission of all matters that either had against the other jointly or severally. To this may be added *Carter v. Carter*, 1 Vern. 259., which I do not quote at length, because my Brother *Burrough* has done so; but which goes to shew, that as the object is to make peace, and to put an end to litigation, the submission is to have a reasonable construction. If the marginal note were to be taken into consideration, viz. that such an award was not only to decide all matters between *A.* and *B.* jointly or separately with *C.*, but, also all matters between *A.* and *B.*, it would decide the question; but I doubt whether the case itself warrants this note. However, it shews the sense, if this note was his, of a very considerable man at that time, (one whom Lord *Kenyon* stated to be one of the ablest men in his profession, though his notes are sometimes loose,) and probably of the profession also, for Mr. *Peere Williams* and Mr. *Melmoth* were the editors, and probably the authors of the marginal notes. Upon the whole, considering that the three have no subject of dispute with the three, and that the parties meant to submit their individual disputes, and thinking that construction may fairly be made from the condition of the bond itself, I am of opinion that the award sufficiently pursued the submission, and that the judgment cannot be arrested.

DALLAS C. J. This case has been so fully discussed by my learned Brothers that I shall content myself with saying that I consider this submission as a submission of all matters in dispute between the six parties individually, and that the award has properly carried into effect the object of that submission.

Rule discharged.

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As to the rule to shew cause why the verdict should not be set aside and a nonsuit entered, all the Court agreed, that there was no variance between the bond produced in evidence and the bond stated in the declaration; and that the rule, therefore, as to that part, should be discharged.

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SWAIN v. MORLAND, Esq.

Where goods had been seized under a *feri facias*, part of them sold on *Saturday*, and the remainder on *Monday*; an extent, tested on the *Monday*, was put into the sheriff's hand at six o'clock, after the goods had been delivered to the purchasers, and the money received by the sheriff: Held, that the execution was executed, and that the party who issued the *feri facias* might recover of the sheriff, in an action for money had and received, the money levied under the sale;

THIS was an action in debt against the Defendant as sheriff of *Kent*, for money had and received by him to and for the use of the Plaintiff. The Defendant pleaded *nil debet*, whereupon issue was joined. The cause was tried before *Dallas C. J.*, at the *London* sittings, after *Michaelmas* term, 1818, when a verdict was found for the Plaintiff for 409*l.* 13*s.*, subject to the opinion of the Court on the following case. In *August*, 1817, *John Sage* and *Thomas Pomfret*, being indebted to the Plaintiff, executed a warrant of attorney for 800*l.*, with a defeazance for the payment of 400*l.* and interest, on the 14th *November* following. The Plaintiff caused judgment to be entered upon such warrant of attorney; and, on the same day, a writ of *feri facias*, tested on the 25th *June*, 1817, returnable in eight days of *St. Martin*, and indorsed to levy 409*l.* 13*s.*, besides, &c., issued upon the judgment against the said *J. S.* and *T. P.*, directed and delivered to the Defendant, as sheriff. The Defendant, as sheriff, granted his warrant on the above writ, on the said 14th *November*; and on the following day, being *Saturday*, the 15th *November*, entered and seized the goods and chattels of *J. S.* and *T. P.*, and began to sell the same; and having, on that day, sold part of the said goods and chattels, viz. to the amount of 146*l.* 3*s.* 5*d.*, continued such sale by disposing,

disposing, in like manner, of the remainder, on *Monday* the 17th of the same month; and all the goods and chattels so seized and sold were moved off the premises of *J. S.* and *T. P.*, on the 17th *November*, before twelve o'clock of that day, by the respective buyers thereof, who paid for the same at the time of removing the goods. Some days after such removal and payment, the Defendant, as sheriff, was called upon to pay over to the Plaintiff the money levied under the writ, which he refused to do; and upon being afterwards ruled to return the writ, he returned, "That by virtue of the writ, he did levy and receive the sum of 413*l.* 16*s.*, which money then remained in his hands. And further returned, that after the execution of the writ, viz. on the 17th *November* then last past, his Majesty's writ of extent tested the same day, was delivered to him against the goods and chattels of *T. P.*, and one *W. Sage*, for the sum of 1361*l.* 16*s.* 5*d.*; and that, on the 26th *November*, a certain other writ of extent, tested the 22d *November*, was delivered to him against the goods and chattels, &c. of *J. S.*, in the writ of *feri facias* mentioned, for the sum of 1361*l.* 16*s.* 5*d.*; and that, in obedience to the said writ of extent, he had taken inquisitions thereon, a copy whereof was to the return annexed. And further returned, that *J. S.* and *T. P.* had not nor had, either of them, any goods or chattels in his bailiwick, (save and except the goods and chattels seized by him, under and by virtue of the writs of extent,) whereby he could cause to be levied the debt and damage in the writ of *feri facias* mentioned, or any part thereof." Then followed the inquisitions taken under the extent, both which inquisitions, after stating what effects *J. S.* and *T. P.* were possessed of on the 17th *November*, and the 10th of *December*, (the day of taking the inquisition,) found, that by virtue of a writ of *feri facias* issued out of the

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Court of Common Pleas at *Westminster*, against the goods and chattels of *J. S.* and *T. P.*, returnable in eight days of *St. Martin*, and endorsed, "*Levy 409l. 16s., besides, &c.*," the sum of *413l. 7s. 6d.* was, on the day and year aforesaid, and on the day of taking the inquisition, remaining in the hands of the sheriff; all which goods and chattels, &c., the sheriff, on the day of taking the inquisition, had, by virtue of the writ thereunto annexed, seized and taken into his Majesty's hands; and further, found that the said *J. S.* and *T. P.* had not, on the day in the writ of extent mentioned, nor at any time since, any lands, &c. or goods, other than as thereinbefore was mentioned, within his bailiwick, that could be extended, seized, or appraised. The money so levied by the said Defendant as sheriff, under the writ of *fi. facias*, was again demanded, and the Defendant again refused to pay the same to the Plaintiff. The writ of extent was issued on the 17th *November*, and tested on the same day, but not received by the sheriff until six o'clock in the evening of that day. If the Court should be of opinion that the Plaintiff was entitled to maintain the action, then the verdict was to stand for the sum of *409l. 18s.*; but if the Court should be of opinion that the action could not be maintained, then a nonsuit was to be entered.

Copley Serjt. for the Plaintiff. In cases like the present, the distinction always taken is, whether or no the property has been altered, *Rex v. Cotton* (a), *Cooper v. Chitty* (b), *Rex v. Wells and Allmatt* (c). Here, the property was altered by the sale, before the writ of extent was delivered to the sheriff; and the goods being sold, the sheriff holds the money in trust for the Plaintiff. The principle seems established by analogy to cases of bankruptcy. Between the act of bankruptcy and the assign-

(a) *Parker*, 112.(b) 1 *Burr.* 20.(c) 16 *East*, 278:

ment of the bankrupt's effects, there is no charge of property as against the crown; but by the assignment the property is altered, and a crown writ tested after the assignment comes too late. The case of *Rev v. Wells and Allnutt*, has been recognized by a late decision in the Exchequer, and the principle respecting the alteration of property, fully confirmed. It may be urged, in the present case, that the writ of extent issued on the same day in which part of the goods were sold, and that, in law, there is no fraction of a day. Generally speaking, if two writs issue the same day, the king's must have priority; but here, the goods were sold and paid for before twelve o'clock, and the extent was not delivered to the sheriff till six. The case does not say that the writ of extent was tested or issued before twelve; and the moment the property is transferred by sale, the money arising from the sale belongs to the party for whom the goods are sold.

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Lens Serjt. for the Defendant. If the money produced by the sale be the party's, there is no difficulty in the case; but the whole argument is, whether or no this is so: and the Defendant contends, that every thing is in progress till the money is actually delivered to the party. If so, the king's writ is in time, if it intervenes at any period before the entire completion of the execution by the delivery of the money to the party. In common cases, where the crown does not intervene, undoubtedly the money must be paid over to the party; but it is very questionable whether the action for money had and received, is the proper mode of compelling the sheriff to do this. Where money is levied by distress by one who has no right to distrain, an action for money had and received will not lie for him who has the right to distrain: the money levied was never his; and in cases like the present, the money is received by the sheriff for the use of the party who shall appear to be ultimately entitled,

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entitled. It is in the custody of the law, in the hands of the sheriff as sheriff, to be thus eventually disposed of, and is never the money of the party till actually delivered to him. The goods disposed of in execution are never the property of the Plaintiff, but of the Defendant in execution; and though by sale the property in them is altered for some purposes, (as towards the purchasers, who would not buy unless it were so,) yet they never become the property of the Plaintiff in execution, unless he buys them himself, and consequently the money produced by them cannot be his, till the law vests it in him by actual delivery: till such delivery, he has no more than a chance of the money, and this chance cannot entitle him to sue in an action for money had and received. The money produced by the goods cannot be distinguished from the goods themselves; and if the Plaintiff has no title to the goods, he has none to the money. The king's writ coming to the sheriff's hand before execution executed by delivery of the money to the Plaintiff, comes before the property in the money is altered, and the king must be preferred. It is decided by *Rex v. Wells and Allnutt*, and that case has been confirmed by a late decision in the Exchequer, that the extent is in time, if delivered at any moment before execution executed, though after delivery of the subject's writ to the sheriff. How can the execution be said to be executed before the money raised is paid over to the party? The party is often obliged to apply to the Court to compel the sheriff to pay the money over, which, of itself, shews that the execution is not executed till such payment over. The application to the Court is a common and proper mode of proceeding; and whether or no an action for money had and received is also a proper course of compelling the sheriff to pay over the money, is the very question now in dispute. At all events, there is no fraction of a day in law; and the king's writ having been delivered before the expiration of
the

the *Monday*, he is entitled to the produce of all the goods sold on that day, at whatever hour the writ might have been tested. The learned Serjeant cited *Rex v. Earl (a)*, to shew the priority given to an extent against assignees of a bankrupt; and *Rex v. Bowdage (b)*, to shew the priority given to it against an extent in aid.

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Copley, in reply. It has been repeatedly decided, that an action for money had and received will lie against the sheriff, the moment he has levied money under an execution. This is an action of the most common occurrence, and the propriety of bringing it appears to have been admitted in *Thurston v. Mills (c)*; *Perkinson v. Gilford (d)*, *Mildmay v. Smith (e)*, and 1 *Saund.* 343., are to the same effect. With respect to the distinction between the goods sold on *Saturday* and those sold on *Monday*, the latter, as well as the former, were sold before the delivery of the king's writ, and the hour of its *teste* is not stated. Here, therefore, there was no concurrence of writs; and it is only where two writs concur, that the king's has a priority, not where it comes after the execution of the subject's writ. In the case of *The Attorney-General v. Capell (f)*, it was held, that an extent would be barred by an assignment of a bankrupt's property, though not by the commission of bankrupt. In *The King v. Bowdage (g)*, both proceedings were at the suit of the crown; and in *The King v. Earl (h)*, the assignees had only taken possession, without proceeding to an actual sale, as the sheriffs did in the present instance.

Cur. adv. vult.(a) *Parker*, 33.(b) *Bunb.* 282.(c) 16 *East*, 252.(d) *Cro. Car.* 539.(e) 2 *Saund.* 344.(f) 2 *Shew.* 420.(g) *Bunb.* 282.(h) *Parker*, 33.

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DALLAS C. J. now delivered the judgment of the Court.

This is an action in debt for money had and received, tried before me at the *Guildhall* sittings after last *Michaelmas* term, when a verdict was found for the Plaintiff for 409*l.* 13*s.*, upon a case which, in substance, states the following facts: On the 14th *November*, 1817, a writ of *fiery facias* issued on a judgment obtained by the Plaintiff against the goods and chattels of *John Sage* and *Thomas Pomfret* for the sum of 800*l.* On the next day, *Saturday* the 15th, the sheriff entered and seized, and sold part of the goods, to the amount of 146*l.* 9*s.* 5*d.* And on *Monday* the 17th, by twelve o'clock on that day, he sold the remaining part of the goods; and, after they had all been delivered and removed, but while the money remained in his hands, a writ of extent, tested the 17th of *November*, i. e. the day of such sale, was delivered to the sheriff; who, therefore, refused to pay over the sum so received to the Plaintiff, to recover which this action was brought.

It is not necessary to say any thing as to the general question, whether the king's writ of extent is to have priority over the writ of the subject, though tested or delivered on a later day, while the goods seized remain unsold in the sheriff's hands; for, here the goods were sold and the money received; and, therefore, the question is, whether, after sale and the goods being converted into money, such money remaining with the sheriff is the property of the crown under the writ of extent, or of the Plaintiff under his execution. And, first, it will be necessary to distinguish as to time. The writ of extent was tested on the 17th, but delivered after the sale; part of the goods were sold on the 15th, i. e. before even the teste of the writ of extent; and, as to the sum produced by these, it has
scarcely

scarcely been contended that the crown is entitled; which, however, would go to proportion only: but, with respect to the latter, it is said, that inasmuch as in point of law there can be no fraction of a day, the writ of extent being tested on the 17th, must be referred to the first moment of that day, and that, consequently, the sale is, by this relation, over-reached. It will be necessary to examine the subject, first, without advert- ing to the distinction between the two days; and, next, as to the effect of such distinction. The writ of extent commands the sheriff to seize the goods and chattels of *John Sage* and another; but the goods in question having been sold, had ceased to be *Sage's* property, so that there was nothing on which the writ could attach belonging to him, as far as concerned the goods merely. The money, it is true, continued in the hands of the sheriff, but not as the property of *Sage*, against whom the extent had issued; for by sale it was the money of the party for whom the goods were sold. And this distinction is recognized in all the cases, in which the general question has arisen, whether decided with or against the crown. The rule which they lay down is, that when execution is executed the property is changed; and execution is said to be executed when a sale has taken place. It will be sufficient to ad- vert to one or two of the cases only. First, In *The King v. Cotton, Parker*, 112., it was decided, that an im- mediate extent against the king's debtor, tested after a distress for rent, shall *before sale* prevail against the dis- tress. And in arguing the claim on behalf of the crown the *Attorney-General* began by premising two things, which are said to be agreed by the counsel on both sides; the second it is not necessary to advert to; the first is in these words, "that if the goods distrained had been actually sold before the day, on which the extent bears *teste*, there would have been no colour for

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a seizure of them; for this plain reason, that the extent authorizes the sheriff to seize the goods of the crown's debtor, and after sale the property would have been out of him, and vested in a stranger. Even in the last case, which decides the general question in favour of the crown (*a*), the same distinction is expressly taken, and the case goes throughout and entirely on the ground, that, till the goods are sold, the execution is not executed; but that by sale the execution is completed, and the property thereby changed. So the case stands on the general ground; and, taking the sale to draw the line, this appropriates to the Plaintiff the goods sold on the first day, and narrows the question to the point, whether the goods sold on the second day are to be distinguished in any respect; or, in other words, whether the writ of extent, though delivered after the sale, must not be considered as acting by relation before, on the fiction of a day having no fraction. To this, in the first place, the reason of the thing seems a sufficient answer. It was not delivered till the property was gone, on which alone it could operate. By sale the execution was executed, and the property changed; and this, not by a judgment of a court of law, not under the controul of the parties, but by the act or the neglect of the party, in not suing out or delivering the writ of extent before. But it was said in the argument at the bar, the sale is only ended when the money is paid over, and, till then, all is in progress. But this is not so: the sale is complete when the party to whom the goods belonged loses his property in them, which vests in him by whom they are bought. The property cannot be in two, under adverse titles, at one and the same time. The sale divesting the property out of the original owner, the money, the produce of the sale, does

(a) *Ren v. Wells and Allnut*, 16 East, 278.

not belong to him. To say, therefore, that the sale is in progress, is to give a meaning to the word which is repugnant to the nature of the thing, and to confound with the sale itself the effect and consequence of it, namely, the final payment of the money to the party under the execution, in whom by the sale the property vested. It has been further said, that the money, while in the hands of the sheriff, represents the goods; it is but the goods converted into money; and so it is: but to what conclusion does this lead? Not that the money belongs to the party to whom the goods belonged, for his property ceased by the sale; and therefore the money, the fruit of the sale, is the property of him to satisfy whose debt the goods were seized and sold. It represents the goods *quoad* the purpose of the writ, *i. e.* to make the property sold belong to the party on whose account they were commanded to be sold. Nor is the observation better founded, that till the return of the writ the money is under the controul of the Court; for, though it be so if not paid over, still it is only to answer the exigency of the writ. But further, the rule is, that the fiction of the law shall not enure to work injustice, and that time may be shewn, at least in many cases, where the justice of the case so requires, as far as time depends on the acts of the parties themselves. In the *Cricklade* case, (*Petrie v. Lord Porchester*), in which the question was, whether the priority of one judgment before another could be averred, where it was admitted in the record, that both judgments were given on the same day, it was determined that it could not. But Lord *Mansfield* takes the distinction between a judgment, which is the act of the Court, and the act of the party, such as the commencement of the suit. And in *Pugh v. Robinson* (a), this distinction is recognised by

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Mr. Justice *Bidder*, who says, the delivery of the declaration is not a judicial proceeding, but the act of the party. Here, then, the delivery of the writ of extent was the act of the party, as the delivery of the declaration was the act of the party in *Pugh v. Robinson*; this case expressly states the delivery to have been after the sale. Narrowing, therefore, our decision to the particular point, we think, that by the sale the execution was executed, and, there being no fact stated from which it appears that the *fiat* for the extent was anterior to the sale, we cannot presume such fact, or suffer a fiction to operate against the justice of this case. One point only remains to be observed upon, and very shortly. Supposing the Plaintiff entitled to the money, still, it has been argued, that this action for money had and received will not lie. And the case of *Thurston v. Mills* (a) has been referred to; but that case was wholly different from the present. The money, therefore, in this case is not retained under any authority of the Court. It is unnecessary to say what the Court would have done, if the sheriff had made any special application, for he has made none; on this, therefore, we give no opinion. But, in this respect, it resembles the case in 3 *Campb.* (b), in which Lord *Ellenborough* held that after a return to a writ of *fiat facias* the sheriff was liable to an action for money had and received without any demand of payment; and though, under the facts, the action appeared to be vexatious, and Lord *Ellenborough* was of opinion the Court would have staid the action, yet, there having been no application, he held that upon the sheriff's return, the money levied was money had and received to the Plaintiff's use, and he had a right to bring an action to recover it, without any previous demand of payment. I mention this case as

(a) 16 E 254.

(b) *Dale v. Birch and Another*, 347.

applying only to the circumstance of no application being made on the part of the sheriff for the return. I am aware, that was merely the common return, and not stating on the face of it any conflicting claims, as the return does here. But, on the general ground, that, in point of law, money had and received by any person is money had and received to the use of the party legally entitled; and that the party so entitled is the Plaintiff in this action, (to the extent of the sum levied under his writ of execution executed, and remaining in the hands of the sheriff at the time of the action brought,) we think the Plaintiff is entitled to recover.

Judgment for the Plaintiff.

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LOWE v. ROBINS.

June 30.

ONSLOW Serjt. on a former day had obtained a rule nisi to set aside, on the ground of irregularity, the judgment on a *scire facias* in this cause, and to allow the Defendant to plead to the *scire facias*. The original judgment in the cause was signed in *Trinity* term, 1808, and the irregularity complained of, was, that the Plaintiff having omitted to sue out a *scire facias* till the beginning of this year (1819), drew it up out of term, and issued it on a Serjeant's signature, instead of making a motion in court: that he had neither given the Defendant personal notice of the proceeding, nor taken care to return two *nihils*. *Bagnall v. Gray* (a) was cited to of being issued upon motion in court, and where the Defendant had no personal notice of the proceeding.

The Court permitted the Defendant to set aside, for irregularity, a judgment on a *scire facias*, where the writ, being issued more than ten years after the original judgment, was drawn up out of term, and issued on a serjeant's signature, instead of being issued upon motion in court, and where the Defendant had no personal notice of the proceeding.

(a) 2 W. Bl. 1140.

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shew that the Defendant in such a case was entitled to personal notice.

Bosanquet Serjt. shewed cause against the rule. In this court the *scire facias* issues on a Serjeant's signature, though, in the King's Bench, a motion in court is requisite. But even if the practice be otherwise, the want of such a motion cannot be taken advantage of on this rule, which is not a rule to set aside the *scire facias*, but merely the judgment on the *scire facias*, and to enable the Defendant to plead. The Defendant having appeared, cannot now move to set aside the writ of *scire facias* itself. At all events, a motion can only be necessary where the proceedings are against a new party, as an executor or administrator, and not where the writ issues against the Defendant himself. With respect to the alleged irregularity in omitting to return one of the *nihil*s, or to give the Defendant personal notice, it was never the established practice to require any affidavit of personal service of notice till the cases of *Bagnall v. Gray* (a), and *Coysgarne v. Fly*. (b) It appears from the latter case, that the practice had commenced only nine years before that time. In this respect, the practice of this Court had always differed from that of the King's Bench (c), where two *nihil*s are required. And at all events, according to *Dyer* (d), one *nihil* is sufficient where the proceeding is against the Defendant himself.

Onslow, in support of his rule, insisted on the authority of *Bagnall v. Gray*, and *Coysgarne v. Fly*.

Cur. ado. vult.

(a) 2 W. Bl. 1140.

(b) 2 W. Bl. 995.

(c) 1 Salk. 599. *anon.*

(d) 168.

DALLAS C. J. now delivered the judgment of the Court.

This case comes before the Court on a motion made on behalf of the Defendant, calling on the Plaintiff to shew cause why the judgment obtained on the writ of *scire facias* issued in this cause, and the subsequent proceedings, should not be set aside. The facts of the case appear by the affidavits to be these. In *Trinity* term in the 48th year of the present king, the Plaintiff obtained a judgment in this court against the Defendant for 105*l.* 19*s.* and *costs*. The Plaintiff took no farther step in the cause till after the expiration of ten years from the time of signing the judgment. After this, a few days before *Easter* term last, the Plaintiff obtained the signature of a Serjeant at Law, to a motion-paper, for the issuing a *scire facias*, calling on the Defendant to shew cause why execution should not issue against him. This was contrary to the well-known practice of the Court; for it is settled, that after ten years such a motion-paper can only be obtained in term-time. By this irregular step the writ of *scire facias* was issued in *Hilary* vacation, about the 7th of *April* last, returnable the first return-day of *Easter* term last.

The writ was directed to the sheriffs of *London*. The sheriffs returned *nihil* to this writ, although the Defendant at the time was resident in *Serjeants' Inn*, in *London*. It is sworn, and not denied, that the Defendant had no notice from the sheriffs, or any one in their behalf, of this writ; and there is no affidavit that he had from any one, personal notice of it, which, according to the case of *Coysgarne v. Fly*, is said to be necessary. We think that where the Defendant resides within the bailiwick of the sheriff to whom the writ is directed, he ought to have notice by summons from the sheriff, and that in such case a return of *nihil*, (that
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is; that he has nothing in his bailiwick whereby he can be summoned,) cannot be supported. After the return of the writ, on the fifth of May, the Plaintiff signed judgment. If the Defendant had moved to set aside the *scire facias* as well as the judgment, the Court must have made the rule absolute; because it is most clearly settled, that after ten years a motion to revive a judgment can only be made during term-time. We think, however, that the rule the Plaintiff has obtained must be made absolute for setting aside the judgment. The judgment was signed on the 5th of May: it was urged at the bar, that the irregularity was waived by the Defendant's appearance to the writ of *scire facias*. This appearance was not entered till the 11th of May. The Plaintiff will have the benefit of this appearance, for it is to the writ of *scire facias*, and he will be enabled to deliver his declaration, and proceed regularly in the cause. We think it no waiver of the objection to the judgment; for, strictly speaking, the *scire facias* is the commencement of a new suit; and the Defendant had right to enter an appearance before he made the motion.

The Rule must be absolute.

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REGULA GENERALIS.

THE Court, on a motion by *Lens* Serjt., on a former day (*June 22.*), to enter up judgment on an old warrant of attorney, on affidavit, that Defendant was alive within nineteen days, (which took the time back before the commencement of the term,) refused the rule, and made a general rule, that the affidavit must, in future, state the Defendant to be alive at a day within the term, on which the motion should be made.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

1819.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Sixtieth Year of the Reign of GEORGE III.

PROMOTIONS.

DURING the last *Easter* Vacation, Sir *S. Shepherd*, Knight, His Majesty's Attorney General, was appointed Lord Chief Baron of the Court of Exchequer in Scotland. And

Charles Warren, Esq. one of His Majesty's Counsel, learned in the law, was appointed Attorney General to His Royal Highness the Prince of Wales, and Chief Justice of Chester.

During the last *Trinity* Vacation, Sir *Robert Gifford*, Knight, His Majesty's Solicitor General, was appointed Attorney General to His Majesty.

John Singleton Copley, Esq. one of His Majesty's Serjeants, learned in the law, was appointed Solicitor

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General to His Majesty, and shortly afterwards received the honour of knighthood. And

Robert Matthew Casberd, Esq. who had previously received a patent of precedence, was appointed one of His Majesty's Justices of the great sessions for the counties of *Wales*.

Nov. 10.

HEARNE v. EDMUNDS.

Where a vessel, being under the conduct of a pilot, in going up a harbour took the ground in the ordinary course of navigation, and afterwards, being moored at a quay, on the ebb of the tide took the ground, fell over on her side, and was injured, and her cargo damaged: Held, that this was not a stranding, for which the insurer was liable.

ASSUMPSIT on a policy of insurance, upon ship and goods, from *Newfoundland* to *Waterford* and *Cork*, or *Cork* and *Waterford*, both or either, including all risk in craft to and from the vessel. At the trial before *Dallas C. J.* at the sittings at *Guildhall* after *Trinity* term, 1819, it appeared that the captain took a pilot at the entrance of *Cork* harbour; that on the 1st of *January*, 1819, in the progress up the harbour, the vessel took ground from shallowness of water, and remained so aground for eight hours, until the tide enabled her to float; that on the 2d of *January* she took the ground from the same cause, at nine o'clock, and remained aground for eleven hours, until again floated by the tide; that on the 3d, the pilot still remaining in command, the vessel was, under his direction, moored during high-water at *Pope's Quay*, where she was to discharge her cargo of fish, and on the ebb of the tide took the ground, made a lust, and lay on her broadside for two whole tides, by which the vessel and cargo were much injured. The taking the ground in manner above mentioned, was stated by a witness to be no more than is usual with all vessels of the same class, in proceeding up *Cork* river. The jury concurred with his Lordship (a),

(a) See *McDougle v. Royal Exchange Assurance* 4 *Campb.* 285. as to the course pursued by Lord *Ellenborough* on a similar occasion.

in thinking that this was not a stranding, and found a verdict for the Defendant.

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Vaughan Serjt. now moved to set aside the verdict, and have a new trial, on the ground, that this was a stranding, and one of the perils provided against by the policy; and he cited *Carruthers v. Sydebotham* (a), as being in point.

DALLAS C. J. I had no doubt at the trial, and I have none now. This event happened in the ordinary course of navigation, and, if it be held a stranding, every vessel which goes up the river at *Cork* must cause a loss to the insurers.

RICHARDSON J. In *Carruthers v. Sydebotham*, the vessel was moored contrary to the usual way, out of the usual place, and against the express orders of the captain. Here, the vessel was proceeding in the ordinary way, and, if this be held a stranding, all insurance to the port of *Cork* (where vessels are obliged to take the ground) must cease. Before the port of *Bristol* was improved, every vessel which arrived there was obliged to take the ground.

PARK J. Concurred; and

Vaughan took nothing by his motion.

BURROUGH J. absent.

(a) 4 M. & S. 77.

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Nov. 10. HARRIS and Another, Assignees of BENDALL v.
WILLIAM PETER LUNELL and Others.

The Defendants, being unable to procure payment for barley which they had sold, and suspecting the vendee to be in bad circumstances, repurchased the barley by a third person, and in his name, a short time before the bankruptcy of the vendee, who was not privy to the contrivance of the Defendants: Held, that this was no fraud within the bankrupt laws.

TROVER for barley. At the trial before *Graham B.* at the *Bristol* Summer assizes, 1819, it appeared, that the Defendants had sold the barley in question to *Bendall*, on the 22d of *January*, 1819; at 7s. 3d. per bushel, to be paid for by a bill at two months. The Defendants finding that *Bendall* was in bad circumstances, and unable to pay, employed *Yeates*, a broker, to repurchase the barley at any price. On the 11th of *March*, *Yeates* repurchased it as for himself, at the price at which it had been sold, though, at the time of the repurchase, the market price was only 6s. 3d. per bushel. *Bendall* was to pay for it by a bill at two months. One of the Defendants, on his examination before the commissioners, admitted, that he directed *Yeates* to purchase it in his own name, without letting *Bendall* know it was for examinant, though examinant and his firm were the covert purchasers. *Bendall*, in fact, gave *Yeates* an order to pay the Defendants the money due to them from *Bendall*, but was in no respect privy to the designs of the Defendants. *Bendall* became bankrupt on the 22d of *March*, 1819. The commission issued on the 3d *April* following. The jury found a verdict for the Defendant.

Taddy Serjt. now moved to set aside the verdict and have a new trial, on the ground that this was a fraudulent transaction, and that the Defendants had accomplished indirectly, what the law would not have allowed them to do directly. They could not, by any direct means, have become possessed of the bankrupt's property, without being liable to the assignees. He urged, that it was not necessary, that the bankrupt should be a party

to

to the transaction, to render it fraudulent within the bankrupt laws; if, without his concurrence, the affair had the effect of working an injustice to the creditors at large, and cited *Noble v. Adams* (a).

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But the Court said they could see no fraud at all in the transaction; and

Taddy took nothing by his motion.

BURNOUGH J. absent.

(a) 7 Taunt. 59.

Sir PHILIP HALES, Bart. and Another, v. *Nov. 15.*
FREEMAN.

ASSUMPSIT on the money counts; plea, general issue. At the trial before *Dallas C.J.* at the *Westminster* sittings after *Hilary* term, 1819, a verdict was found for the Plaintiffs for 114*l.* 15*s.*, subject to the opinion of the Court on the following case.

Dame *Mary Linch*, by her last will dated the 31st *January*, 1786, devised all her real estates to the Plaintiffs and Sir *Brooke Bridges* and *John Conant*, both since deceased (upon trust), and bequeathed to the Defendant *Nancy Freeman* an annuity of 100*l.*, clear of all deductions during her life, and declared, that the same should be payable quarterly on the usual quarter days, and secured upon her real estates; the first payment was directed to be made on the quarter day after her decease. The testatrix died in June, 1808. By indenture of assignment dated the 15th *August*, 1809, the Defendant, in consideration of 400*l.* advanced, assigned to *Mary Mayo* the sum of 58*l.* 16*s.*, part of the

Trustees under a will, who pays the legacy duty upon an annuity after the expiration of four years from the death of the testator, may recover the amount of the duty from the legatee, notwithstanding a previous assignment of the annuity by such legatee. *Vide* 36 G. 3. c. 52.

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said annuity, with proviso for redemption on payment of the 400*l*. By an indenture of assignment of several parts, dated 15th *April*, 1813, to which the Defendant, *Mary Mayo*, and *Jane Peckharnis* were parties, the Defendant and *Mary Mayo*, in consideration of 250*l*. paid to the Defendant, and 400*l*. paid to *Mary Mayo*, assigned to *Jane Peckharnis* the whole of the said annuity of 100*l*., with a covenant from the Defendant, that the annuity was free from incumbrances. The Plaintiffs omitted to pay the legacy duty of 10*l*. per cent. per annum, until the time hereinafter mentioned, and regularly paid the annuity to the Defendant in full, without demanding, receiving, or deducting the said duty chargeable thereon, down to the 25th *March*, 1813, and afterwards to *Jane Peckharnis*. The Plaintiffs, on the 24th *May*, 1816, paid to the Stamp Office the sum of 57*l*. 7*s*. 6*d*., and on the 28th *August*, 1816, the further sum of 57*l*. 7*s*. 6*d*., making together the sum of 114*l*. 15*s*., the full amount of the duty. The first application to the Defendant for payment was made on behalf of *Mrs. Peckharnis*, on the 21st *May*, 1817. The Plaintiffs afterwards, on the 9th *January*, 1818, applied for payment to the Defendant on their own behalf.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover? If the Court should be of that opinion, then the verdict was to stand, otherwise a nonsuit was to be entered.

Lens Serjt. for the Plaintiff. The rule concerning voluntary payments cannot apply to this case; for here, by act of parliament a duty is imposed on a legacy; it is not a case, where a party by voluntary payment takes the debt on himself; but, where a party necessarily pays the debt, as trustee, and then calls upon the person, for whom he has paid it, for re-payment. This being a debt due from the Defendant, it makes no difference

ference either in law or reason, that so long a time has elapsed before this action was brought; nor is the Defendant put in any worse condition by such delay. There are two statutes which affect this question, the first, the 36 G. 3. c. 59., [more particularly in its sixth section, which enacts, that the legacy duty shall be paid by the person taking on himself the execution of a will, and if not duly paid, that it shall become the debt of the person taking execution of the will, and if he shall pay the legacy without deducting the duty, that it shall become a debt to the crown from the legatee:] and the 45 G. 3. c. 28. which is only material, inasmuch as it extends the operation of the former. The main question turns on the former statute. During the whole of the period before payment, the legatee and the executor are both debtors to the King. The eighth section of the 36 G. 3. indeed enacts that the duty shall be paid by annual instalments of four equal payments, the first payment to be made before, or on completing the payment of the first year's annuity, and the three other payments before, or on completing the respective payments of the three succeeding years' annuity, but these provisions are only directory, and in case of the executor, both parties being debtors to the crown, and the executor liable to exchequer process. This was originally a debt of the defendant, and remaining unpaid up to 1816, the demand till that time subsisted in full vigour against both. No payment was made by the executor or legatee, and government remained unsatisfied. The executor is bound to pay in the first instance; but for whom? On behalf of the annuitant who is the party interested, and to whose use this money has been paid. The executor stands in this case in the situation of a surety, who is entitled to be at any time indemnified by his principal. In order to support the argument that this was a voluntary payment, *Denby v. Moore* (a) was cited at

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(a) 2 B. & A. 123.

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the trial. But the decision in that case proceeded mainly on the special nature of the property tax act, and in prevention of any frauds on the revenue. *Brisbane v. Dacres* (a) was also cited; but, there, the party acted under the notion, that there was a legal demand on him, though none in fact existed. That case is widely different from the present. Here there is no mistake of law or fact, nothing which can let in the rule "*ignorantia juris non excusat*."

Taddy Serj., contra. In order to recover money paid to the use of a party, it is necessary to shew, that it was paid on account of the party, or by his authority, express or implied. Neither the one nor the other of these two ingredients exist in the present case. According to the statute, the duty is to be paid by the executor by four equal payments in four years, and his right to retain or deduct is confined to those four years. The object of this enactment is manifestly to quicken the executor's accounts with government. The statute does not give the four years so much as a boon, but rather enacts that the executor shall not have more than four years to make his payment. If the deduction might be made at any time afterwards, why has the legislature specified four years as the time to be allowed? The latter part of the clause in this act (b) does indeed make both the executor and legatee debtors to the crown, but it does not create a debt from one of the parties to the other. The executor therefore pays for himself, and cannot be said to make a payment for another. Here, too, the annuity was assigned, and the payment made by the Plaintiff could be no benefit to the Defendant on this record. In *Andrew v. Hancock* (c) it was held, that a party, who had omitted to deduct the tax within the current year could not deduct it afterwards; and the nature of the

(a) 5 Taunt. 143. (b) 36 Gr. 37, 41, 52, 53, 6. (c) *Ante*, 37.

tax does not prevent that decision from applying to the present case; for the land tax, though payable by the tenant, is deducted from the rent, and ultimately falls on the landlord. In the present case, not only is the payment, but also the retainer to be made within the four years, which makes strongly for the Defendant's argument. It has been urged, that the executor is no other than a surety, and is therefore entitled to be at any time indemnified by his principal; but the liability of a surety to his principal was considered an invasion at first in the courts of law, and was only supported on equitable grounds. *Toussaint v. Martinent* (a). The doctrine of principal and surety, however, cannot apply here, for there is no connection between the executor and the Defendant.

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Lens in reply: The Defendant's counsel has perverted the meaning of the act of parliament, which never intended to make the executor ultimately suffer, but only gives directions as to the time of payment and retainer, in case of the legatee. After four years, the power of retaining is certainly gone, but the right to recover back whatever is paid still remains; and, though no express authority for making the payment be given to the defendant, an authority is clearly implied, as the Defendant was bound to pay the money, though the executor might be called on in the first instance. The right to retain during the four years is a consequence of the payment. If the payment be made, the retainer cannot be otherwise than just, and the executor would have been entitled to it equally, if the act had contained no such provision. It does not follow, that the Defendant derived no benefit from this payment, because she had assigned the annuity. She had received the whole originally, and was therefore enabled

(a) *2 T. R. 503; versus Boller J.*

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to assign it to greater advantage. The executor cannot be considered as any other than surety for the legatee, for it never was intended that the executor should suffer by the payment. The decision on the land tax act turns entirely on the nature of the duty, which is, in the first instance, a tax on the occupier. Under the present Act, both parties are made debtors, but the money is paid for the legatee.

DALLAS C. J. This case depends on the construction of clauses in two different statutes, viz. the 36 G. 3. c. 52. and the 45 G. 3. c. 28. By the former statute, which relates to personal property only, it is directed (a), "that the duty chargeable upon annuities shall be paid by the person or persons having or taking the burthen of the execution of the will, or other testamentary instrument, or the administration of the personal estate of any person deceased, or upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons having or taking the burthen of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy or any part of any legacy, or the residue of any personal estate, or any part of such residue which such person or persons shall be entitled,

so to retain either in his, her, or their own right, or in the right or for the benefit of any other person or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then, and in every of such cases the duty, which shall be due and payable upon every such legacy and part of legacy, and residue and part of residue respectively, and which shall not have been duly paid and satisfied to His Majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taken the burthen of such execution or administration as aforesaid, to His Majesty, his heirs and successors, *and in case any such person or persons so having or taking the burthen of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or deducted the duty chargeable thereon, (such duty not having been first duly paid to His Majesty, his heirs or successors, according to the provisions herein contained,) then and in every such case such duty shall be a debt to His Majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.*" The legacy in question is an annuity charged on a real estate, and the 45th of the King puts that on the same footing as personal property. The 8th section of the first act directs, "That the value of any legacy given by way of annuity, whether payable annually or otherwise for any

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any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively.⁶ In this case the payment is made after four years, the executor not having deducted the duty within that time, and the action is brought on the clause of the statute, which enacts, that if the duty be not deducted, it shall be the debt both of the executor and the legatee.³ With respect to the latter party, he remains unquestionably liable, notwithstanding the power of the executor to deduct, if the executor, having omitted to deduct, incur a debt to the crown; if he pay that debt out of his own fund, the amount of the duty becomes a debt from the legatee to the executor. It is urged that all the instalments ought to be paid in four years, but the statute goes on, and anticipating the case of an omission of payment by the executor, makes the legatee also a debtor: that puts by all the argument as to the four years. There is no necessity to travel back to former decisions, because I go on this statute alone. This does not resemble the case of a voluntary payment, or a payment made in ignorance of fact or law. So far from being a voluntary payment, it is clearly compulsory by the force of the statute holding both executor and legatee at any time. Both parties, therefore, in this case, the payment made by the executor in substance a payment for the legatee, are entitled to recover.

PARK J. At first sight it seems a hardship on the legatee, that, after some time had elapsed, and after an assignment of the annuity, she should be called on to pay the duty; but it would be much harder if the executor, who has no interest whatever in the annuity, should pay the duty out of his own pocket. It is not necessary to resort to former decisions, because the statute, on which the present case turns, is so different from the statutes, on which those decisions are grounded, that no comparison can arise between them. In the decisions on the property tax, paving, and land tax acts, the Court went on the words of the statute, which make the occupier liable. The executor, here, is only made liable for the benefit of government, and not on his own account. He has not paid the money voluntarily, as in *Brisbane v. Dacres*, and *Bilbie v. Lumly*, but upon compulsion. He pays, not on his own account, but on that of the legatee. The executor is no more than surety for the legatee, and his case falls within the principles applied to the case of sureties.

BURROUGH J. This case turns entirely on the clause of the act of parliament. The party, who receives the benefit of the legacy certainly ought to bear the charge of the duty; and the annuitant, here, not only had the whole benefit of her legacy, but received more than she was entitled to, the duty not having been deducted. It has been urged that this was a voluntary payment; but a payment cannot be called voluntary, where, if the party omit to make it, he may be compelled to do so, and, here, the Plaintiff might have been compelled to pay; now, where a party may be compelled to make a payment, he is always entitled to make it without compulsion. Here the Plaintiff is made liable as a trustee, who applies all the money arising under the will, for the benefit of others. If the Plaintiff had been sued by the crown, and had paid this money, can there be a doubt

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doubt that it would have been a payment made for the legatee? The executor is not to bear the burthen, but the legatee. The case on the land tax act does not apply; that is a tax falling completely on the tenant of the land, and he must pay on account of his own possession. It is so much a tax on the tenant, that, except for the purpose of enabling the landlord to vote at elections, the landlord's name would not be on the rate.

RICHARDSON J. This case is distinguishable from *Denby v. Moore*, and *Andrew v. Hancock*, by reason of the clause in the sixth section of the act. In *Denby v. Moore*, the tenant had paid an excess of rent voluntarily, so in *Andrew v. Hancock*; and nothing in either case remained due from the tenant to the crown. But in the present instance the duty remains a debt as well in the legatee as the executor. It is urged, that the executor cannot recover from the legatee, because the duty is the debt of both of them; but the contrary seems to result from the act: the executor stands in the situation of a surety, and his principal becomes liable to him for whatever he has paid. In this case, therefore, there must be judgment for the Plaintiff.

Judgment for the Plaintiff accordingly.

LEVIN and Others v. WEATHERALL and Others: Nov. 15.

THIS cause came on for hearing before the Master of the Rolls on 5th March, 1819, when his Honour directed that the opinion of the judges of this court should be taken on the following case:—By indentures (tripartite) of lease and release, dated the 8th and 9th December, 1731, being the settlement made upon the marriage of *Henry Woodgate* and *Ann Downing*, for the consideration therein mentioned, *H. W.* conveyed certain premises situate at *Ulcombe*, in the county of *Kent*, to two trustees in fee, to hold the same to the use of the intended husband, his heirs and assigns, till the marriage, then to the use of the intended husband and wife, and their assigns, for their respective lives, *sans waste*, and after the death of the survivor of them,

A settlement made on the marriage of *H. W.* with *A. D.*, (after giving the husband and wife respectively estates for life, with a power of appointing by deed or will jointly, during the coverture, and in default of such appointment, separately, after the death of either,) contained the fol-

lowing limitation in default of any such appointment:—"To the use of all and every the child and children of the marriage, both sons and daughters equally, part and share alike, if more than one, as tenants in common and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of 21 years, without issue of his or their body or bodies lawfully issuing, then, so often and as to the part and share, parts and shares of all and every such child and children, to the use of the surviving children, part and share alike, if more than one, as tenants in common and not as joint tenants, and to the heirs of the body of every such child and children, until every such child and children should be dead; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child in tail, and for default of issue of the marriage, and in case there should be issue who should all die without issue under the age of 21 years, then to the heirs and assigns of the survivor of *H. W.* and *A. D.* in fee." The marriage between *H. W.* and *A. D.* having taken place, *H. W.* died intestate, leaving his widow and two children, *Joseph* and *Ann*. The widow made her will, devising the property over, only in case of the death of both children without issue, before 21, and died, leaving the two children, *Joseph* and *Ann*, who both attained the age of 21 years. *Ann* married *T. Weatherall*. *Joseph* died shortly after, having made his will, by which he gave all his real estates in the county of *K.* or elsewhere, to his sister *Ann*, the wife of *T. Weatherall*, in fee: Held, that *Ann*, who was already tenant in tail of one moiety of the lands comprised in the marriage settlement, became, as the heir at law of *J. W.*, tenant in fee of the other moiety.

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then to the use of such child and children of the intended marriage, in such shares as husband and wife, during their joint lives by any deed or writing properly executed and attested, or in default thereof, as the survivor of them by deed or will, properly executed and attested should limit or appoint, and for default thereof and subject thereto, " to the use of all and every the child and children of the said intended marriage, both sons and daughters, equally, part and share alike, if more than one, as tenants in common and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years, without issue of his or their body or bodies lawfully issuing, then and so often, and as to the part and share, parts and shares of all and every such child and children so dying; to the use of the survivors of such children equally part and share alike, if more than one, as tenants in common and not as joint tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, until every such child and children shall be dead without lawful issue of their each and every of their bodies lawfully issuing; and in case there shall be but one child only of the said intended marriage, or one only surviving child thereof, then to the use of such only, or only surviving child, of the said intended marriage, be the same a son or a daughter, and of the heirs of the body of such only, or only surviving child; and for default of such issue, or in case there should be issue of the said intended marriage, who should all die without issue of his or their body or bodies lawfully issuing, under the the said age of one-and-twenty years, then to the use of the heirs and assigns of the survivor of the said H. W. and A. D. for ever." Shortly after the date and execution

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of the said indentures of lease and release *H. W.* intermarried with *A. D. H. W.* died in the year 1740, intestate, leaving *A. W.* his widow. *H. W.* had issue by *A. W.* two children; viz. *Joseph* and *Ann*. *A. W.* the elder, after the death of *H. W.* made and published her will in writing, dated the 14th February, 1741, duly executed and attested in the manner required by law for devising freehold estates, and thereby, (provided her said children should respectively die before their ages of twenty-one years without issue lawfully begotten,) did give, devise, and bequeath, all the aforementioned messuages, lands, tenements, and premises, to her mother, *Martha Downing*, for life; and, from and after the decease of *Martha Downing*, to *John Cooper*, in fee. *A. W.* the elder, died, in the year 1742, leaving her two children, *Joseph* and *Ann*, her surviving, having made no other appointment or disposition of the estate at *Ulcombe* than by her said will. *Joseph* and *Ann* both attained the age of twenty-one years. *Ann*, in December, 1754, intermarried with *Thomas Weatherall*. *Joseph* made and published his will in writing, duly executed and attested, so as to pass freehold estates, dated 5th November, 1755, and after charging them with debts and legacies, gave all his real estates in the county of *Kent*, or elsewhere, within the kingdom of *Great Britain*, to his sister *Ann Weatherall*, the wife of the said *Thomas Weatherall*, her heirs and assigns for ever. *Joseph* died shortly after the date of his will, without having revoked or altered the same, and without issue, leaving *Ann Weatherall*, his sister and heiress at law. The estate at *Ulcombe* is subject to the custom of gavelkind. The question for the opinion of the Court was, "Whether, upon the death of *Joseph Woodgate*, *Ann Weatherall* became tenant in tail in possession of the messuages and hereditaments at *Ulcombe*, in the county of *Kent*, comprised in the indentures of lease and release of the 8th and 9th December, 1731, or

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what other estate she had therein, or in any, and what part thereof?"

Lens Serjt. for the Plaintiff. The terms of the settlement have created cross remainders; and this appears not merely from the intent, but also by the express words; for the Plaintiff admits the necessity of express words to carry such limitations into effect. The words, "and in case there shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years without issue of his or their body or bodies, &c." coupled with the words, "until every such child and children shall be dead without lawful issue," sufficiently show the intention that the estate should go over. It will be contended, that the provision, in case any child should die under the age of twenty-one years, distinguishes this from ordinary cases. Indeed, if these words had not been inserted, the present case would have fallen at once within the authority of *Doe dem. Watts v. Wainwright* (a). (The argument there was, that the instrument under consideration, being a deed, there could be no question of implication; when Lord *Kenyon* said, that the deed contained express limitations, by way of cross remainders, in terms sufficiently denoting, that it was the intention of the parties to the deed, that there should be cross remainders as to some of the children.) But the terms used in the present case, though varying a little from those used in *Doe v. Wainwright*, sufficiently denote the intention of the parties to create cross remainders. *Meyrick v. Whishaw* (b) certainly stands in the way of the Plaintiff, and bears a strong resemblance to the present case; but there is this distinction, viz. that in *Meyrick v. Whishaw* the words, "Until every such child and children shall be dead without lawful issue of their and every of their bodies

(a) 5 T. R. 427.

(b) 2 B. & A. 810.

lawfully issuing, are not to be found; and these words evidently show that the estate was to go over. It is, also, to be observed, that when the provision is made in favour of one child only, the age of one-and-twenty years is not mentioned.

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Blossett Serjt. *contra*. The case of *Meyrick v. Whishaw* is decisive of the present question; but in the absence of that case, the Defendant would be supported by *Doe v. Wainwright* and other authorities. There is nothing in this case to show an intention that cross remainders should arise, where either of the children died after twenty-one: indeed the contrary may be inferred from the circumstance, that the party knew how to create such a remainder where he wished it, and has done so to meet the case of children dying under twenty-one, and to meet that case alone. This property, too, was gavelkind; therefore the limitation over to the survivor of husband and wife in the event of the death of the children under twenty-one years not having taken effect, the remainder in fee resulted to the settler, *Henry Woodgate*, and descended to *Ann Weatherall* and *Joseph Woodgate*: *Joseph Woodgate* having devised to *Ann Weatherall* in fee, she has now the fee in the whole: as to her own moiety, in remainder after her estate tail; as to the other moiety, in possession. It is questionable whether the expressions here used, except as to children dying under twenty-one, would imply cross remainders, even if it were the case of a will. That point, however, does not arise, for it is admitted by the counsel for the Plaintiff, that there must be express words of limitation, to constitute a cross remainder: indeed it is clear, from the cases of *Doe v. Dorrell (a)*, and *Doe dem. Foquett v. Worsley (b)*, that such a remainder cannot be implied in

(a) 5 T. R. 521.

(b) 1 East, 428.

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 a deed. The case of *Doe v. Wainwright* is rather with the Defendant than with the Plaintiff: the great contest in that case was concerning the meaning of the word surviving, which was considered to have caused the chief difficulty in the case. Serjeant Williams, in his note to *Cook v. Gerrard* (a), says, cross remainders may be created by deed; but then it must be by express words. He then states the usual form, which, he says, it is not necessary, though certainly prudent, to use; and then he quotes the very words of the deed in *Doe v. Wainwright*, and cites that case as an authority, that a deed so worded contained express limitations by way of cross remainders, which, though not in the formal language used by conveyancers, were yet in terms sufficiently denoting, that it was the intention of the parties in the deed that there should be cross remainders. But the words used in the present case, except as to children dying under age, do not express limitations by way of cross remainder, and are far from being sufficient to denote an intention to create them. If the present case were *res integra*, and the case of *Meyrick v. Whishaw* had not been decided, the judgment would be for the Defendant.

Lewis in reply. There is no difference in effect, whether the question arises on a deed, or a will. There must indeed be express words of limitation in a deed, because from them alone the framer's intent is implied: there need not be words of limitation in a will, for the party is in that case considered *inops concilii*, and his intent is implied without them. But here are the words of limitation "heirs of their bodies," and it makes no difference that this is a case of gavelkind property. The term "surviving" was not held to afford any con-

(a) 1st Williams's Saunders, 185. note 6.

clusive objection against the cross remainder in *Doe v. Wainwright*. The words here are, "and in case any such child or children shall happen to die under the age of one-and-twenty years without issue of his or their body or bodies lawfully issuing, then and so often and as to the part and share, parts and shares of all and every such child and children so dying, to the use of the survivors of such children equally part and share alike, if more than one." So that the provision is, in effect, the same as in *Doe v. Wainwright*. The words, "until," &c. coupled with the others, render that perfect, which would otherwise be incomplete. Intent will, in general, be implied as well in a deed as in a will, except as to limitations, which must be expressed as they are here, by apt words; and *Merrick v. Wilkins* goes entirely beside this doctrine.

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The following certificate was afterwards sent

"This case has been argued before us by counsel; we have considered it, and are of opinion, that, upon the death of *Joseph Woodgate*, *Ann Weatherall*, who was already tenant in tail in possession of one moiety of the messuages and hereditaments at *Ulcombe*, in the county of *Kent*, comprised in the indenture of lease and release of the 8th and 9th of *December*, 1781, became, as the heir at law of *Joseph Woodgate*, tenant in fee of the reversion of that moiety, and tenant in fee in possession of the other moiety.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

November 26th, 1819."

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any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged according to the tables in the schedule hereunto annexed; and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively." In this case the payment is made after four years, the executor not having deducted the duty within that time, and the action is brought on the clause of the statute, which enacts, that if the duty be not deducted, it shall be the debt both of the executor and the legatee. With respect to the latter party, he remains unquestionably liable, notwithstanding the power of the executor to deduct, if the executor, having omitted to deduct, incur a debt to the crown; if he pay that debt out of his own fund, the amount of the duty becomes a debt from the legatee to the executor. It is urged that all the instalments ought to be paid in four years, but the statute goes on, and anticipating the case of an omission of payment by the executor, makes the legatee also a debtor: that puts by all the argument as to the four years. There is no necessity to travel back to former decisions, because I go on this statute alone. This does not resemble the case of a voluntary payment, or a payment made in ignorance of fact or law. So far from being a voluntary payment, it is clearly compulsory on the clause of the statute holding both executor and legatee liable at any time. Both parties, therefore, being liable in this case, the payment made by the Plaintiff was in substance a payment for the legatee, and the Plaintiff is entitled to recover.

February, (executed after the dissolution of the partnership,) and made between *Boehm* of the one part, and *Thornton* and *Berney* of the other part, (reciting, that *Boehm* was desirous of converting all his freehold, leasehold, and copyhold estates into money; and, as it would be convenient to him to raise money at an early period, and *Thornton* and *Berney* were willing to assist him in that object on being indemnified from all losses by reason of affording such assistance, that *Boehm* had, for those purposes, determined to convey the said property to *Thornton* and *Berney* upon the trust thereafter expressed :) it was witnessed that, for the purpose of carrying such desire into effect, the said *Boehm* did convey to *Thornton* and *Berney* and their heirs, executors, administrators, and assigns, respectively, divers freehold and leasehold hereditaments, lands, and premises, being all his freehold and leasehold estates in *England*, with the appurtenances; and did covenant to surrender divers copyhold hereditaments, being all his copyhold hereditaments, to the use of *Thornton* and *Berney*, their heirs and assigns, "upon trust, that the trustees, their heirs, executors, administrators, and assigns, should forthwith, and at such time or times as they in their discretion might think fit, absolutely sell and dispose of the same, either together, or in lots, and either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers thereof, or of any part thereof respectively, and for the best price or prices that could be reasonably had or gotten for the same; and, in the meantime, and until such sale, should raise (by way of mortgage of all or any part of the same, for all or any part of the estates and interests thereby granted, or agreed to be granted or surrendered therein respectively,) any sum or sums of money, which the trustees for the time being might think expedient to raise, or which *Boehm*,

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doubt that it would have been a payment made for the legatee? The executor is not to bear the burthen, but the legatee. The case on the land tax act does not apply; that is a tax falling completely on the tenant of the land, and he must pay on account of his own possession. It is so much a tax on the tenant, that, except for the purpose of enabling the landlord to vote at elections, the landlord's name would not be on the rate.

RICHARDSON J. This case is distinguishable from *Denby v. Moore*, and *Andrew v. Hancock*, by reason of the clause in the sixth section of the act. In *Denby v. Moore*, the tenant had paid an excess of rent voluntarily, so in *Andrew v. Hancock*; and nothing in either case remained due from the tenant to the crown. But in the present instance the duty remains a debt as well in the legatee as the executor. It is urged, that the executor cannot recover from the legatee, because the duty is the debt of both of them; but the contrary seems to result from the act: the executor stands in the situation of a surety, and his principal becomes liable to him for whatever he has paid. In this case, therefore, there must be judgment for the Plaintiff.

Judgment for the Plaintiff accordingly.

pay all the expences attending the preparing and executing of the said indentures of lease and release, and assignment; thirdly, to pay all principal money and interest, which might, from time to time, become due and payable in respect of any sum or sums of money which the trustees for the time being should raise by mortgage of the said premises, or any of them, or any part thereof, respectively, by virtue of the trusts for that purpose there- inbefore declared; fourthly, to indemnify *Thornton* and *Berney* respectively, and their respective heirs, executors, administrators, and assigns, and all other persons, from such sum or sums of money respectively as *Thornton* and *Berney* respectively, and their respective heirs, executors, and administrators, and any other person or persons, who, at the request, or with the concurrence or approbation of the trustees for the time being, jointly with the consent or concurrence of *Boehm*, should be or become liable or engaged to pay, on the account of *Boehm*, either alone or jointly with *Taylor*, his partner, or jointly with any person or persons, either by way of advance, or loan, or by the indorsement or acceptance of any bill or bills of exchange, or promissory notes, or notes of hand; and, for that purpose, to pay the same sum and sums of money, and all interest in respect thereof, to the person or persons entitled to such sum or sums of money respectively, and interest, as to those, who, by payment thereof should be entitled to stand in the place of the person or persons respectively, of whom the money should be borrowed, or to whom the same should be guaranteed, or secured, or made payable; and lastly, to pay the residue of the said monies (if any) to *Boehm*, his executors, administrators, and assigns for his and their own absolute use and benefit, and as part of his personalty." In the said indenture of release were also contained various other clauses, pro- visions, and conditions for vesting the balances, which, for

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for the time being should be in hand, in government securities, devising the lands and estates, appointing other trustees in case of death or refusal to act, &c. &c.; and the counsel were to be at liberty to refer to the whole of the said indentures. At the time of the execution of the said indentures, the other property of *Boehm*, independently of the partnership assets, which were not sufficient to pay the partnership debts, consisted of his plate and furniture in his three houses in *St. James's Square*, at *Bath*, and *Ottershaw*; the stock of his farm at *Ottershaw*; a reversion in funded property, timber, bank stock, and other personal effects, to the value of about 27,000*l*. Neither *Berney* nor *Thornton* was, nor is either of them, on his own separate account or jointly with his co-partners, a creditor of *Boehm* and *Taylor*, or either of them, on any account whatsoever. *Boehm* was then rather induced to convert his freehold, copyhold, and leasehold estates into money, by reason of his advanced age, and to obviate difficulties, which might have arisen respecting the sale of his estates, and the payment of his debts, if he had died without executing any conveyances of such estates; or if, by reason of his age and infirmities, he had become unable to execute such conveyances; and, under the circumstances before-mentioned, and with the views, intents, and purposes aforesaid, he executed the indentures of the 13th and 16th *February*, 1819. After the dissolution of partnership, and the execution of the indentures of lease and release, *Boehm* paid, satisfied, and discharged the acceptances and other negotiable securities of the late partnership, either out of his own separate funds, or out of the assets of the late partnership of *Boehm* and *Taylor*, until the 5th *March* following. After that time the said negotiable securities, as the same became due, were taken up and paid by *E. Fletcher*, *J. Alexander*, and *H. Porcher*, of *Devonshire Square*, *London*, trading

under the firm of *Fletcher, Alexander, and Co.* for the honour of the drawers thereof. *Boehm* and *Taylor*, at the time of the execution of the said indenture of release and assignment, were unable, from their pecuniary assets, to discharge their pecuniary engagements, entered into on account of their partnership. On the 27th April last, in pursuance and execution of their trust, *Thornton*, *Berney*, and *Boehm*, proceeded to sell by auction some of the freehold, leasehold, and copyhold estates of *Boehm*, and the above-named Defendant bought part of the freehold property at such sale. By a deed poll, dated 28th April, 1819, *Boehm* and *Taylor* did, and each of them did appoint *Fletcher, Alexander*, and *Porscher*, jointly, and each and every of them, severally, their and each of their true and lawful attorneys and attorney for them and each of them, with the fullest powers to all and each of them to make demands of every kind, and enforce them by suits at law or in equity, to receive, and upon receipt, to give discharges; to indorse notes, bills, drafts, or orders, in order to obtain payment; to examine and settle all accounts, to compound debts due to the firm, to contest, compromise, submit to arbitration, or conclude any disputes, in which the firm might be concerned; to execute arbitration bonds, to appoint one or more attorneys under them, and to revoke such appointment if necessary; *Boehm* and *Taylor* agreeing to ratify whatever should be done under this power of attorney. *Fletcher, Alexander*, and *Porscher* were not, nor were or was any or either of them creditors or creditor of *Boehm* and *Taylor*, or either of them. By indenture dated the 26th June, 1819, and made between *Thornton* of the first part, *Boehm* of the second part, and *Berney* of the third part, (after reciting that no act had been done, or money raised by *Thornton* and *Berney* in the execution or performance of all or any of the trusts created,

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created by the indenture of the 15th *February*, and that *Thornton* was desirous of relinquishing the trusts reposed in him by the said indenture, and that *Boehm* was desirous and consenting that all the estate and interest of *Thornton*, under the said indenture of release, should be conveyed to *Berney* alone, upon the same trusts as the same were then vested in *Thornton* jointly with *Berney*. *Thornton* made a release and assignment, by which all his estate and interest was vested in *Berney*, as sole trustee upon the trusts declared thereof by the said indenture of release. An abstract was furnished by the vendors to the purchasers of part of the freehold property, of a draft of a deed then in progress, [in the expectation that that deed would be executed, with a communication at the time, that it had not been executed; and which deed never was engrossed, finally settled, or approved by any of the intended parties thereto, but was afterwards abandoned, of which the purchasers' solicitors were informed by the vendors' solicitors by letter of the 9th *July*, 1819,] which draft of a deed purported to be intended to be made between *Thornton* and the complainant of the first part, *Boehm* of the second part, and the several persons whose names were mentioned in the first and second columns of the schedule thereto of the third part, the said *Fletcher*, *Alexander*, and *Porcher* of the fourth part, and *E. Parry*, Esq. and *Fletcher* of the fifth part, whereby, [after reciting, among other things, the indentures of lease and release, and assignment of the 13th and 15th of *February* last, and that *Boehm* and *Taylor* lately had occasion for the sum of 130,000*l.*, and that the several persons, whose names were mentioned in the first column of the schedule to the indenture of release and assignment, at the request of *Boehm* and *Taylor*, or one of them, drew the several bills of exchange described in the same schedule, in

favour

favour of *Boehm* and *Taylor*, upon the several persons, whose names were mentioned in the second column of the said schedule, who, at the like request, and as surety for *Boehm* and *Taylor* jointly, and also of *Boehm* separately, had accepted the same bills of exchange, and, that the said bills of exchange were respectively drawn and accepted by the several persons mentioned in the first and second columns of the schedule thereto, upon the faith and agreement of *Boehm*, that the same persons should be respectively indemnified, by means of the trusts thereafter contained for their benefit, from the payment of the same bills of exchange, and all costs, charges, and expences which they might sustain on account thereof; and further reciting that *Boehm* and *Taylor* had discounted the said bills of exchange, amounting together to the sum of 150,000*l.* with the governor and company of the Bank of *England*, and when the same bills should fall due, the loan was intended (if the Bank of *England* should consent thereto) to be renewed for successive periods of two months until *Boehm* and *Taylor* should be enabled to provide for, and discharge the said bills of exchange outstanding, for the time being; and further reciting, that *Fletcher*, *Alexander*, and *Porcher* had agreed to advance to or for *Boehm* and *Taylor*, at the request of *Boehm*, the sum of 40,000*l.* and, that it was probable, that other sums of money might be advanced by them to *Boehm*, or to *Boehm* and *Taylor* at the instance of *Boehm*, and that the said sum of 40,000*l.* had been advanced, or was about to be advanced to *Boehm* and *Taylor*, on the agreement of *Boehm*, that, that sum and the interest thereof, and also all other sums which might be advanced by *Fletcher*, *Alexander*, and *Porcher* to *Boehm*, his executors or administrators, or to *Boehm* and *Taylor* at the instance of *Boehm*, his executors or administrators, together with interest on such last-mentioned sums, should be secured by

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by means of the trusts thereafter declared for the benefit of *Fletcher, Alexander, and Porter*; and further reciting, also, that *Boehm* was desirous that the freehold, copyhold, and leasehold manors, messuages, lands, tithes, and hereditaments comprised in the indenture of release and assignment of the 15th February, should be vested in *Parry and Fletcher* upon trust for indemnifying the several persons, whose names were mentioned in the first and second columns of the said schedule from the payment of the said bills of exchange, and every of them, or the renewed bills to be given in lieu thereof; and also for securing to *Fletcher, Alexander, and Porter* the said sum of 40,000*l.* and other sums, which might from time to time be advanced by them to *Boehm* or his *Boehm* and *Taylor*, at the instance of *Boehm*; it was witnessed, that, (for carrying the desire of *Boehm* into effect, so far as related to the freehold hereditaments and premises, and in performance of the said agreement on the part of *Boehm*,) *Thornhill and Berney* (at the instance and request, and by the direction and appointment of *Boehm*,) bargained, sold, and released, and *Boehm* granted, bargained, ratified, and confirmed unto *Parry* and *Fletcher*, their heirs and assigns for ever, all the freehold manors, messuages, lands, and hereditaments, which were comprised in, and conveyed by the indentures of lease and release and assignment of the 13th and 15th February, then last past, to hold the same to the use of *Parry and Fletcher*, their heirs and assigns for ever, upon the trusts thereafter declared concerning the same: in the said indenture was contained a covenant to surrender certain copyhold hereditaments, and an assignment of certain leasehold premises, and also a declaration and agreement that *Parry and Fletcher* should stand seised of the said freehold, copyhold, and leasehold messuages, lands, and hereditaments, upon trust of their own proper authority, and without any further

further consent or concurrence, by or on the part of *Bealm*, his heirs, executors, administrators, or assigns, to sell and dispose of the said freehold, copyhold, and leasehold manors, messuages, lands, and hereditaments; and upon further trust in the mean time, and until such sale, to raise by mortgage of all or any part of the said freehold, copyhold, and leasehold messuages, lands, or hereditaments respectively, any sum or sums of money, which *Barry* and *Fletcher*, or the survivor of them, his executors or administrators should think expedient to raise, or which *Bealm* should require to be raised for the purposes of that indenture, and it was thereby declared that *Barry* and *Fletcher* should stand and be possessed and interested in the money, which should arise from such sales or mortgages, and from the yearly rents and profits of any of the manors, messuages, lands, or hereditaments, which should be received by him or them in the mean time, until the same should be so sold, upon trust, in the first place, to reimburse themselves all costs and expences, which might be incurred in the execution of the trusts thereby created; and, in the next place, to indemnify and save harmless the several drawers and acceptors respectively of the bills of exchange, and their respective heirs, executors, administrators, or assigns, against all costs, charges, and expences, which they might sustain, expend, or be put unto on account of the same; and also pay, or cause to be paid, unto *Fletcher*, *Alexander*, and *Parcher*, the sum of 40,000*l.* and interest for that sum, and also other sums of money which *Fletcher*, *Alexander*, and *Parcher* should, from time to time, advance to *Bealm*, his executors, or administrators, on to *Bealm* and *Taylor*, at the instance of *Bealm*, his executors or administrators, with interest on all such sums as therein mentioned, and to put the several persons named in the said schedule, and also *Fletcher*, *Alexander*, and *Parcher*, on a like or equal footing, by paying

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paying to the several persons named in the schedule, or to their heirs, executors, administrators, or assigns, the amount of the damages sustained by them respectively, and to *Fletcher, Alexander, and Porcher*, the said sum of 40,000*l.* with interest for the same, without regard to any further sum and sums of money to be advanced by them to *Boehm*, his executors or administrators, or to the said *Boehm* and *Taylor*, at the instance of *Boehm*, his executors or administrators, rateably, and without any priority or preference whatsoever of any one or more of them the several persons named in the schedule, or of *Fletcher, Alexander, and Porcher*, or their respective heirs, executors, administrators, and assigns, over any other or others of them, or his or their heirs, executors, administrators, and assigns; and for this purpose of equality, the damages sustained by the persons who had given and should give the said bills of exchange, and the said 40,000*l.* advanced or to be advanced by *Fletcher, Alexander, and Porcher*, as aforesaid, for such and so many parts of the damages and advance as should remain unpaid, should form one total, and the said produce should be divided between the persons respectively entitled to the same damages and money, rateably, by a pound rate, until they should have received the full amount of the same damages and money respectively, and all interest payable in respect thereof; and in further trust, after receiving from *Boehm*, his executors or administrators, or from *Boehm* and *Taylor*, or raising by the ways and means aforesaid, and paying and retaining the said sum and sums of money, costs, charges, disbursements, and expences, to render and pay all the surplus or residue of any which should remain of the money arising from the said sale or sales, or from any of the ways and means aforesaid, unto *Boehm*, his executors, administrators, and assigns; to be considered, at all events, as personal estate

estate discharged from all claim on the part of the heir at law of *Boehm*, and the said several manors, messuages, &c. should thenceforth be considered as money, and as converted into personal estate.—The sums of 130,000*l.* and 40,000*l.* mentioned in the said draft were not, nor was either of them or any other sum advanced, or raised; nor were the bills of exchange mentioned therein, or any of them, drawn, or any other act contemplated in the said intended instrument performed.—The question for the opinion of this Court was, “Whether the execution of the said indenture of release and assignment, bearing date the 15th day of *February*, 1819, and of the said power of attorney dated the 28th day of *April*, 1819, and the circumstances aforesaid, or any of them, were under the circumstances, an act of bankruptcy of the said *Edmund Boehm*?”

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Lord Serjt. for the Plaintiff. The question is, whether the conveyance of the 15th of *February*, coupled with the circumstances mentioned in the case, constitutes an act of bankruptcy? The principle deducible from the numerous cases on this subject is, that a conveyance by a trader of all his effects by deed, to the exclusion of one or more of his creditors, is an act of bankruptcy. Under circumstances too, a conveyance of part of his estate is an act of bankruptcy, though of itself unaccompanied by any ill intention or fraud, as, where there is a culpable exception of a small part of the estate or effects; but beyond that, the transfer of part of a trader's estate, particularly for the purpose of raising money, has never been deemed an act of bankruptcy. In the present case, so far is the transfer from being a transfer of all the trader's property, that it leaves him all his stock in trade, and other things, to the amount of 27,000*l.*; and he is not divested of control over any part of his property but that which is sold to raise money. If to

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raise money thus be an act of bankruptcy, no trader can ever supply himself by disposing of his property. In the present instance, the trader only sold an inconvenient property, freehold, leasehold, and copyhold, in order to obtain money for the purpose of meeting all demands with greater facility. Unless, therefore, some case be cited exactly in point, the present transaction can never be considered an act of bankruptcy, or fraudulent transaction, or calculated to defeat the bankrupt laws. As to the power of attorney, that stands by itself, and has nothing to do with *Alcock's* capacity to act as a trader: the power creates no disability, divests no right. But, in point of fact, it never took effect. The 40,000*l.* was never advanced, the 120,000*l.* was never raised; and these circumstances were only inserted in the case to show the intention of the parties. It never can be contended that they evinced any intention of fraud, for they were all proposed with a view to the benefit, not to the prejudice of the creditors. *Law v. Skinner* (a) comes nearest to the present case; but even that essentially differs, for, the party there had conveyed all his stock in trade, which afforded the chief reason for holding the conveyance fraudulent: there is no such incident in the present case.

Beaumont Serjt. contra. The conveyance of the 15th of February amounted to an act of bankruptcy; if not when, at all events when coupled with the subsequent deed to *Alcock* and Co. The authorities on this subject may be divided into two classes; first, those where *all* the trader's property is transferred, by which an act of bankruptcy is committed, whatever might or might not have been in the contemplation of the party; secondly, where *any part* of the property is conveyed with a colour.

(a) 2 *Bl. Rep.* 996.

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able exception, or intention, to defraud or delay creditors. The 27,000*l.* remaining in the hands of the party, it cannot be contended that this is a conveyance of *all* his property. Nevertheless, it seems to fall within the principle of all the cases, and the spirit of stat. 1 Jac. 6. 15. s. 2, by which it is enacted, that any person using the trade of merchandise, who shall "make, or cause to be made, any fraudulent grant or conveyance of his, her, or their lands, tenements, goods, or chattels, to the intent, or whereby his, her, or their creditors shall or may be defeated or delayed for the recovery of their just and true debts, shall be accounted and adjudged a bankrupt to all intents and purposes." The house of *Bachin* and *Taylor* having dissolved partnership, and being indebted to a considerable amount, this deed is executed; and what does it cover? All the freehold, leasehold, and copyhold property; in comparison with which the personal property, though large, may be considered almost as nothing. The property is conveyed, not to creditors, but to trustees; not for sale, nor in trust for *Bachin*, so as to be subject to his controul, but to trustees to convey, with or without *Bachin's* consent, for the purpose of securing those who might advance money. If a commission of bankruptcy were to issue, and this be considered a genuine deed, the consequence would be, that the commission would have the 27,000*l.*, but none of this immense mass of real property. It has been argued, that except a conveyance of this description be a conveyance of *all* the property, it does not fall within the class of cases, which have held a conveyance of *all* the property an act of bankruptcy, unless circumstances of fraud be shown; but that is not the sole principle on which those cases turn. The words of the statute of *Jacobs* are, "Whereby his, her, or their creditors may be defeated or delayed." Now if the party does convey away, how-

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ever fair his meaning, it is an act of bankruptcy, because the property is taken out of his controul. (*Richardson J.* supposing, under this deed, nothing had been done by the trustees before an act of bankruptcy had taken place, would not the property have passed to the commissioners as trust property?) In general it would be so, but this deed is so contrived, that persons who advance money under it would have a claim prior to the commission. In all cases where a deed has been framed for the distribution of effects among creditors, the deed has been held void; otherwise, where the property has been sold *bona fide* out and out. But as there is no case exactly similar to the present, it must rest on principle alone. When the effect of a deed is to delay creditors, it constitutes an act of bankruptcy, and the effect of this deed is clearly delay. If *Boehm* had conveyed on an absolute sale, and had received the money, there could have been no complaint; but, here, the property is placed out of his control, and yet there is no absolute sale; and though none of the cases correspond with the present in circumstances, in principle they all comprehend it. In *Harman v. Fisher* (a), Lord *Mansfield* speaking of a trader, says, "He cannot assign his effects to all his other creditors, in exclusion of one, whom he thinks dishonest or unjust: nor even to be equally divided amongst all his creditors; because he cannot take his estate out of that management which the law puts it into. If any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed." If a trader offend against the bankrupt laws as to a single acre, by placing it out of his control, it is an act of bankruptcy, because it tends to defeat and delay creditors; and the same reasoning must equally apply to the transfer of any large mass of his property. In

(a) *Coop.* 231.*Rust*

Rust v. Cowper (a), Lord Mansfield refers to *Linton v. Bartlett* (b), (which certainly falls within one of the two classes of law pointed out by the other side), but how does he look at the principle? "Every case that has determined a conveyance by a trader of his whole effects to pay a creditor, to be an act of bankruptcy, proceeds on this foundation; that it is fraudulent against the bankrupt laws, and therefore void" (c). Is it less fraudulent if the party conveys three-fourths of his property, and the creditors are delayed? "Every case which says it is an act of bankruptcy, if one creditor only is excepted out of such conveyance, goes upon the same principle. It was long ago determined, that a conveyance of all a man's effects was clearly a fraudulent conveyance; and leaving out something or a part by way of colour will not mend it" (d). Undoubtedly in the cases to which his Lordship alludes, there was the ingredient of an unjust preference; but if he relied on that, why did he say what he has done respecting the principle. So in *Morgan v. Horseman* (e) where, though there was a fraudulent preference, the same reference to the principle is made, the same reliance on the circumstance of creditors being delayed. But it is urged, that the object of this deed was to enable *Boehm* the better to carry on his trade. Nothing of that is said in the deed; and it expressly appears that *Boehm* was eighty years old. As to the deed of *Fletcher and Company*; the affairs of *Boehm's* and *Taylor's* house being in such a condition, that it was uncertain whether the whole property of the house would pay the debts due from it, a deed is made enabling *Fletcher and Co.* to do every thing by which *Boehm* could be bound, and

(a) *Cowp.* 629.(b) 3 *Wils.* 47. cited also in *Cowp.* 124.(c) *Cowp.* 632.(d) *Ibid.*(e) 3 *Taunt.* 245.

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giving them a complete controul over all the money to be raised by the deed. Can it be said then, that *Boehm's* whole property is not placed out of his control, or that he had not an intention of settling his affairs in a manner different from that, which the law points out? (*Park J.* the deed to *Fletcher and Co.*, is not a conveyance.) But it is a power to affect all the property, and to make conveyances. If the Court should be of opinion that the conveyance of the 15th *February*, does not constitute an act of bankruptcy, as not comprising the whole of the property; yet, it is submitted, that the whole object of the arrangement was to take out of the legal mode of distribution property, which ought to have gone to the creditors.

Leahs, in reply. The general principle relied on must receive its limitation from the circumstances of each case. Unless the general expression of "putting out of control," be taken with the restrictions which each particular case furnishes, no trader can dispose of any of his property, because, by so doing, he puts it out of his control, and gives it a direction, which it would not otherwise receive. But in the present instance, the deed has no such effect as that of putting the property out of the party's control. Unless the property were absolutely sold, the deed would have no effect to bar the assignees, who might call the trustees to account. The property was never out of *Boehm's* control, for the mere sale does nothing, it is the application of the money that must be looked to, and the application, here, was never in the discretion of the trustees, but under the control of *Boehm*, and the sales were to be made for the express purpose of facilitating the arrangement of the trading concerns. It ought to be distinctly shewn by those who impeach this conveyance, that it was not a *bona fide* transfer of part of the trader's property.

property. But no such position can be maintained; here was no contemplation of bankruptcy, no preference or exclusion of any creditor, no transfer of all the party's stock in trade, nor any act done which could prevent him from carrying on his business. The point, therefore, comes to this, has any case been determined in which an assignment, transfer, or change of the general mass of a trader's property, for the purposes of his business, has been held an act of bankruptcy? As to the power of attorney, it was revocable; no interest passed under it; it had no operation of itself, being only in contemplation, and, in point of fact, never took effect. The whole transaction was no more than a design to facilitate, not counteract a speedy settlement of the creditor's demands.

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The following certificate was afterwards sent:—

"This case has been argued before us by counsel; we have considered it, and are of opinion that the execution of the indenture of release and assignment bearing date the 15th day of *February* 1819, and of the power of attorney dated the 28th day of *April*, 1819, and the circumstances mentioned in the case, were not, nor was any of them an act of bankruptcy by the said *Edmund Boehm*.

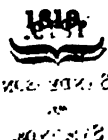
R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

November 25th, 1819."



November 20.

SANDERSON and Another v. SYMONDS.

Policy of insurance on ship, "at and from *L.* to her port or ports, place or places of discharge, and loading in *Africa* and *African* islands, and during her stay there, and at and from thence back to *L.*, or her final port or place of discharge in the United Kingdom, with liberty in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever as above: to sell, barter, and exchange goods, and load, unload, and reload goods, at any or all of the ports and places she may call at, or proceed to." — The insured, subsequently to the execution of the policy, inserted after the words "*during her stay*," the words "*and trade*." Some of the underwriters assented to the alteration by subscribing their initials; others refused their assent. In an action against one who refused, held, that the alteration was immaterial, and did not avoid the policy.

ASSUMPSIT on a policy of insurance on the ship *Venerable*, "at and from *Liverpool*, to her port or ports, place or places of discharge and loading in *Africa* and *African* islands, and during her stay there, and at and from thence back to *Liverpool*, or her final port or place of discharge in the United Kingdom:" with liberty, on that voyage, "to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever as above; to sell, barter, and exchange goods, and load, unload, and re-load goods at any or all of the ports and places she may call at and proceed to." At the trial before *Dallas C. J.* at the *London* sittings after *Trinity* term, 1819, it appeared, that the vessel, on her return home, was totally lost in *Cardigan Bay*, and the defence set up to this action, was, that the policy had been materially altered by the Plaintiffs, after the subscription of it by the defendant. The alteration proved, was, the insertion or interlineation of the words, "*and trade*," after the words "*during her stay*," and the circumstances attending the alteration, were as follows: The Plaintiff, an insurance broker, fearful that the words "to sell, barter, and exchange goods, and load, unload, and re-load goods," might not be sufficiently extensive

to include a trading, after the subscription of the policy by the different underwriters interlined the words, "and trade," and having done so, presented it to the various underwriters for their consent to this alteration. Some of them, in token of such consent, signed their initials to the interlineation, but the Defendant refused to do so, alleging that he never under-wrote trading policies to *Africa*, and offering to return the premium and cancel the policy. The declaration, containing a count setting forth the words "and trade," as part of the instrument, and another omitting them, the objection of the alteration was not urged so much on the ground of a variance between the contract entered into, and the contract proved, as that it rendered the instrument totally void. The learned Chief Justice having directed the jury, that if independently of the words inserted, the Plaintiffs had, by the policy, liberty to trade on the coast of *Africa*, they were entitled to recover, the jury found a verdict for the Plaintiff.

Lens Serjt. on a former day obtained a rule nisi, to set aside this verdict and enter a nonsuit, on the ground, that the alteration in question had avoided the policy. He cited *Langhorn v. Cologan (a)*, and *Fairlie v. Christie (b)*, to shew that an alteration of the policy after subscription rendered it void.

Vaughan Serjt. now shewed cause. The alteration complained of is wholly immaterial. It adds nothing to the insurer's risk, and does not give the insured a power to do any one thing he equally was not entitled to do under the policy as it stood originally. All the expressions of the policy, before the alteration, clearly

(a) 4 Taunt. 330.

(b) 7 Taunt. 416.

shew,

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shew, that the vessel was intended to trade on the coast of *Africa*; if they have not that meaning, they can have none at all, and if they have, how can the insertion of the words "*and trade*," have altered the legal effect of the instrument? It will never be contended, that an immaterial alteration can avoid the instrument. The Court may be spared the cases collected in *Comyns' Digest*, under title *Bond*, on the subject of alterations of instruments; these cases do not apply to policies of insurance, which differ from other instruments, inasmuch as they contain so many unconnected parties; but it seems to be implied by the terms of 55 G. 3. (a), that alterations in policies are usual and legal. It is there said, "that nothing in that act contained shall extend to or be construed to extend to prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 18s. *per cent.* on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by this act, and so that no additional or further sum shall be insured by reason or means of such alteration." And it appears by this act, that, even in cases of stamps, where so much strictness prevails, a greater latitude is frequently allowed, than is contended for by the Plaintiff on the present occasion. In *French v. Patton*, indeed (b), Lord Ellen-

(a) G. 63. c. 13.

(b) 9 East. 332.

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Dorough observed, that the alteration was such as to make the policy speak a different language, and lose its original identity, but in the present case nothing is added which the policy did not in substance contain before. The cases of *Langhorn v. Cologan*, and *Fairlie v. Christie*, cited by the counsel for the Defendant, are inapplicable. In *Langhorn v. Cologan*, Lord Mansfield said, "the instrument now is different from what it is stated in the only count, on which the Plaintiff could have recovered at the trial. The alteration is a very material one." But in that case a specific subject of insurance was added afterwards. So in *Fairlie v. Christie*, a material alteration was made, and the instrument was, therefore, held to be another and different contract; whereas, here the words are merely words of repetition; for by the terms of the policy, a liberty to trade was virtually given before the interlineation complained of as varying the instrument, took place.

Lees in support of the rule, contended, that as the Defendant had expressly refused to underwrite a trading policy to *Africa*, the alteration in question could not be deemed other than material, and as completely varying the identity of the instrument. If the alteration was material, it would follow beyond dispute, that the instrument was rendered void. He insisted, that the statute which had been cited, applied only to cases of alteration made with content of both parties, and that no answer had been given to the authority of *Langhorn v. Cologan*.

DALLAS C. J. There can be no doubt, that, on the facts of this case, the Defendant is liable on his policy. Even as the Defendant has shaped his own statement, the vessel has done no more than it was agreed she should

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should do. As the policy originally stood, she had liberty to sell, barter, and exchange; load, unload, and re-load goods at any or all of the ports and places she might call at and proceed to. Under this general liberty, the jury had no doubt that the vessel had liberty to trade; indeed, the very acts specified, are descriptive of trading, and of nothing else. It appears that the Plaintiff afterwards introduced the words "and trade;" with what view is immaterial; but he went round to the various underwriters for the purpose of obtaining their consent to the alteration. Some agreed, and some refused; but it is quite clear upon the face of the instrument, that the alteration was immaterial, and that the Defendant would have been liable if no such words had been introduced. The case, therefore, does not come within the reasons of former decisions. If a deed be altered in a material point by a stranger, it is rendered void; if it be altered in an immaterial point by a party, it becomes, in some cases, void. The original rule was not intended so much to guard against fraud, as to insure the identity of the instrument and prevent the substitution of another, without the privity of the party concerned. But the present case stands on its own circumstances. The instrument in question is a policy of insurance, an instrument signed by a number of individuals wholly unconnected in interest, and between whom no privity can exist. Indeed it has never been contended that this was an alteration without the privity of the party, and the old cases turn entirely on alterations without the privity of the party: here, the instrument was shewn to all the parties concerned; those who put their initials to the alteration, thereby expressed their consent to it; those, who refused to do so, expressed their denial by the absence of their initials. But the latter were bound by the policy as it stood at first, the former

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by the policy in its altered shape. The words interlined are no more than a proposed alteration, adopted by those who subscribe their initials, refused by those who do not subscribe.

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PARK J. I am of the same opinion. The words of the instrument, as it originally stood, are "to sell, barter, exchange, load, unload, and reload goods at any or all ports and places;" and the party puts in the words "and trade." It was properly considered by the jury, whether the words, "and trade," made any difference. The jury thought not; and the common sense of the thing would lead to the same conclusion, for no ship goes to Africa without trading. Without entering into the decision in *Leonard (a)*, the law on the alteration of mercantile contracts is laid down in *Master v. Miller (b)*; but the present case turns on a policy of insurance, and in all the cases on policies the Court refers to the materiality of the alteration; as in *Campbell v. Christie (c)*: so in *Langhorn v. Cologan*, and *Fairlie v. Christie*. The alteration here is immaterial, the risk stands as it stood before, and the writing immaterial words does not vacate the policy.

BURROUGH J. If the insertion of these words had altered the effect of the policy, I should think the Defendant was not liable to the present demand. But they do not alter it; for the insured were to have liberty to sell, barter, exchange, load, and reload; and more than this is not comprehended in the words, "and trade." There can be no colour for saying that this alteration is material; and the jury have held that it is not material. In all the cases the judges put their finger on

(a) *Lord Darcy v. Sharp*. 1 Leon. 282.

(b) 4 T. R. 320.

(c) *Starkie*, N. P. C.

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that point. *Master v. Miller*, and all the others, turn on the materiality; more especially so in policies of insurance: and though it has been asserted that an immaterial alteration vacates a bond, yet no authority has been adduced in support of that position.

RICHARDSON J. I am of opinion that the Defendant is not discharged in this case, because the alteration made is immaterial; the ground, on which the cases have turned, is, that the alteration has varied the identity of the contract. My brother *Leny* says, the identity of the contract is altered here. I think not. If the Defendant had consented to this alteration, the Plaintiff might have declared on the policy as it originally stood, and yet have fallen into no variance, because he would still have set out the substance of the instrument; and the substance of it was, that the insured were to go and trade: the instrument now produced would have proved that contract.

Rule discharged.

Nov. 24.

BRITTAIR V. KINNAIRD and Another.

In trespass against magistrates for taking and detaining a vessel, a conviction by the defendants, under the Bum-

boat act, (no defect appearing on the face of the conviction), is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned.

In an action against a magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained in it.

that

that the vessel in question, which was decked, and of the burthen of thirteen tons, was seized by the defendants, as magistrates, under the Bum-boat act (a). The Plaintiff was about to offer evidence, that the vessel in question was not a boat within the meaning of the act, when it was objected by the counsel for the Defendants, that the conviction was the only admissible evidence of what the magistrates had determined, and was conclusive as to the subject matter of that determination. The Chief justice coinciding in that opinion, the conviction was put in, and appeared to be a conviction under the stat. 2 G. 3. c. 28., for that "the Plaintiff unlawfully had in his possession in a certain boat in the river Thames certain stores; to wit, 850lbs. weight of gunpowder; and 88lbs. weight of ball cartridges, which had then lately been unlawfully procured from and out of a ship or vessel in the said river Thames." His lordship being of opinion, that the conviction was a conclusive defence to the action, directed a nonsuit, reserving the point. Accordingly,

Vaughan Serjt., on a former day, had obtained a rule nisi for a new trial, on the ground that the magistrate had, by the act, no power to take any thing but a boat; that he had no right to assume to himself a jurisdiction by calling that a boat which was in truth a vessel; and that he could not, by the terms of his conviction, exclude a party from raising the question on the subject matter of it: the learned serjeant cited *Davison v. Gill* (b) and *Welch v. Nash* (c) in support of his motion.

Lens Serjt. now shewed cause. The only mode of getting rid of a conviction is by appeal or *certiorari*: as long as a conviction remains unquashed, it is conclusive of the facts stated in it. Whether the subject

(a) 2 Geo. 3. c. 28.

(b) 1 East. 64.

(c) 2 East. 394.

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matter of this conviction were a boat or not, was the very question to be decided before the magistrate, and upon which his decision was final. Even if the magistrate, contrary to all law and fact, had corruptly stated that to be a boat which was clearly a ship, the Plaintiff's remedy would be by information, not by action. Had a want of jurisdiction, or other defect, been apparent on the face of the conviction, the case might be otherwise; but while the conviction remains unimpeached, the merits of the case cannot form the subject of enquiry by action.

Vaughan and *Lawes* Serjts. in support of the rule. The question to be decided, in reality, amounts to this, whether, in cases of summary convictions, where neither appeal nor *certiorari* is allowed, such convictions are to be deemed conclusive of the facts stated in them; and whether the party, who feels himself aggrieved, is precluded from shewing, that the convicting magistrate had no jurisdiction. In such cases, if the party is not allowed to shew that the facts, on which jurisdiction is assumed, had no existence, the doors of justice are closed against him. Had the magistrate, then, jurisdiction over this vessel? That he had not, will appear from a perusal of the fifth section of the act (a),

(a) 2 G. 3. c. 28. "And be it enacted by the authority aforesaid, that it shall and may be lawful for the said master, wardens, and assistants, or such person or persons as they shall from time to time depute and appoint under the seal of their corporation, and for all owners or masters of ships or vessels, either in whole or in part in the said river respectively, or for such person and persons as the said owners and masters, or any seven or more of them, by writing under their hands and seals,

shall, for that purpose, nominate, depute, and appoint (and which it shall be lawful for them, from time to time, to do) at any time or times from and after, &c. to stop, search, and detain in some place of safety, any boat which there shall be reason to suspect has any ropes, cordage, tackle, apparel, furniture, stores, materials, or any part of any cargo or lading stolen or unlawfully procured from or out of any ship or vessel in the said river; and also to apprehend and detain, or cause which

which gives the magistrate a jurisdiction of a very limited nature. Whether the attention is drawn to that, or any other section, no doubt can exist, that boats alone formed the subject matter of the jurisdiction intended to be given by the act. The frequent thefts carried on in open boats on the river were the grievances, at which this statute was pointed; and this is made still more clear by the statute 54 G. 3. (a), which enacts, that "forfeited *boats*, instead of being burnt, may be restored or sold." In the fifth section of the former act, the term *boat* alone is used, "Any *boat* with her tackle," &c. "to direct such *boat*, with her tackle, &c. to be burnt and destroyed, or restored, &c." Now the vessel in question was a decked vessel, of the burthen of thirteen tons, and registered. Here then the jurisdiction of the magistrate is limited, both as to subject, person, and place; and all such matters must be traversable. Suppose the vessel in question had been a seventy-four gun ship; can it be contended, that the Court would be estopped by the terms of the conviction from receiving evidence of such an excess of jurisdiction? If a magistrate assumes juris-

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to be apprehended and detained, any person or persons who may be reasonably suspected of having or conveying any such goods, stores, or things in such boat; and such person or persons so apprehended shall be (as soon as conveniently may be) conveyed before one or more justice or justices of the peace for any county, city, division, liberty, or place adjoining to the said river; and if such person or persons shall not produce the party or parties from whom he, she, or they bought or received such merchandises,

goods, stores, or things aforesaid, or some credible person, to depose upon oath the sale or delivery thereof, or shall not give an account to the satisfaction of such justice or justices how he, she, or they came by the same; that then the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanor; and such boat, with her tackle, apparel, furniture, and loading, shall, upon such conviction, be forfeited and disposed of as is hereinafter directed."

(a) c. 187. s. 22.

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diction by falsely asserting the fact, upon which alone his jurisdiction is founded, such a proceeding may be the subject of enquiry by action, *Welch v. Nash* (a): whether the adjudication be in the shape of an order or a conviction, the consequence is the same; and the question, in either case, is, whether the party, against whom such order or conviction is made is concluded by it. Suppose a magistrate were to state, as is stated in this case, that a party was found with certain stores in his possession, in a boat, on the river *Thames*, in the county of *Middlesex*, and then were to adjudge such person guilty; and it were to be the fact, that such boat was on the river in another county, the magistrate having acted out of his county, it would be competent to give parol evidence of that fact in contradiction of such conviction. What is the case of a rate? If a party be not occupier, the whole proceeding is *coram non judice*. In *Perkin v. Proctor* (b), the question being, whether the party was a trader within the bankrupt laws, an action was brought, on the ground that the commissioners had no jurisdiction; and *per Curiam*, "We are all of opinion, that the commission of bankruptcy is void, and of no avail; the jurisdiction concerning bankrupts is confined to particular persons and cases," &c.; and the case of the *Marshalsea* (c) was cited, with this observation, "Where there is no jurisdiction at all, there is no judge; the proceeding is as nothing." In *Terry v. Huntington* (d), when the commissioners determined low wines to be strong waters, it was held to be a proceeding *coram non judice*; in that case the commissioners had done what the magistrates have done in this, *viz.* taken upon themselves to exercise a power over a subject which did not fall within their juris-

(a) 8 East, 394.

(b) 2 Wils. 382.

(c) 10 Rep. 76. a. b.

(d) Hardress, 480.

diction. *Hale* C. B. says in that case, "The proceeding here is *civiliter*, not *criminaliter*, as in the case cited out of 12 Co. But the case of a justice of peace seems to come fully up to ours; for the justice had a jurisdiction, but he kept not within it: and suppose the commissioners should adjudge small-beer or water to be strong-beer, it would be mischievous, if the subject, in such a case, should have no action upon a distress taken for a forfeiture." In order to create a jurisdiction, facts must exist; and if no enquiry is to take place concerning those facts, a magistrate stands entrenched behind his own conviction, even if he has exceeded his jurisdiction. But there are cases which decide that a conviction is not conclusive of the facts stated in it; *Henshaw v. Pleasance* (a), *Milward v. Coffin* (b); and the stat. 31 G. 3. (c), making the adjudication of a magistrate conclusive, affords a strong reason for supposing, that, before the passing of that statute, such an adjudication was considered as not conclusive. An act of parliament followed in the same session (d), which repealed the 31 G. 3., and so left the matter as it stood before.

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DALLAS C. J. The general principle applicable to cases of this description, is perfectly clear; it is established by all the ancient, and recognised by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject matter in the present case were a boat, it is agreed that the boat would be forfeited, and the conviction stated it to be a boat. But, it is said, that in order

(a) 2 Blk. 1174.

(b) 2 Blk. 1330.

(c) G. 35. s. 47.

(d) 21 G. 3. c. 64.

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to give the magistrate jurisdiction, the subject matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction, by showing that this was not a boat. I agree, that, if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of parliament he is empowered to search for and seize gunpowder in any boat on the river *Thames*. Now allowing, for the sake of argument, that "boat" is a word of technical meaning, and somewhat different from a vessel; still it was matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But, it is said, that a jurisdiction limited as to person, place, and subject matter, is stinted in its nature, and cannot be lawfully exceeded. I agree; but, upon the enquiry before the magistrate, does not the person form a question to be decided by evidence? does not the place, does not the subject matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged, and how could the magistrate decide, but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact, which did not exist. But he is bound to enquire as to the fact, and, when he has enquired, his conviction is conclusive of it. The magistrates have enquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged, that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally, and, if

the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend every thing against a stinted jurisdiction, that is not the rule now, and nothing is to be intended, but what is fair and reasonable, and it is reasonable to intend, that magistrates will do what is right. But cases have been cited, and first, a case in *Hardress (a)*; what is the principle there? That an action will lie against an officer for executing the process of a limited jurisdiction in cases, to which such jurisdiction does not extend; it is admitted however in that case, that, if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small-beer to be strong, their judgment could not have been examined in an action. What is said by the different judges, and especially by Baron *Rainsford*? "That the Defendants might well enough have justified by virtue of an authority from the commissioners of excise, who are judges of the fact, and that their authority is not traversable by the Plaintiff." Now, apply that case. If it had appeared upon the face of the conviction, here, as it did, there, upon the special case, that the magistrates had no jurisdiction, the judgment of the Court might have been different. But the magistrates have jurisdiction here: they have jurisdiction over gunpowder found in a boat, as in the other case, the commissioners had over the beer. The decision in *Crepps v. Darden (b)*, turned expressly on the ground that the magistrate had no jurisdiction, and that the justification set up was illegal on the face of it: that case, therefore, and *Gray v. Cookson (c)*, are clear authorities to show, that a conviction like this must be conclusive. *Welch v. Nash* was no sooner cited in

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(a) *Terry v. Huntington, Hardress*, 480.(b) *Cowp.* 640.(c) 1 *East*, 13.

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Gray v. Cookson, than *Bayley J.* distinguished it as turning only on an *ex parte* order of justices; a proceeding in no way resembling a conviction, where the matter is investigated on oath in the presence of both parties. I am, therefore, most clearly of opinion, that this rule ought to be discharged.

PARK J. All the cases from *Hardress* downward concur in one uniform principle, that where a magistrate has jurisdiction, a conviction by him is conclusive evidence of the facts stated in that conviction. In *Dr. Groenvelt's* case (a), *Holt C. J.* expressly says, "That if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, their judgment could not have been examined in an action." My Brother *Laws* has said much about the commissioners of bankrupts; the same topic was urged before Lord *Holt*, but the reply was that they are not judges. In *Gray v. Cookson*, Lord *Ellenborough* says, "The justices had by law the authority, which they in fact exercised in this case, by a commitment under this conviction; and that they were, therefore, entitled to have been acquitted under the general issue pleaded by them." *Ackerly v. Parkinson* (b) is a remarkably strong case; there the Defendant a vicar general of the bishop, had excommunicated the Plaintiff for not taking administration of an intestate's effects; and though the citation, by which the Plaintiff was cited, was void, still, the subject matter of the judgment being a thing within the Defendant's jurisdiction, the Court held that the action did not lie. In *Strickland v. Ward* (c), *Yates J.* says, "The conviction cannot be controverted in evidence. The justice having a

(a) 1 Lord *Raymond*, 471.

(b) 3 M. & S. 411.

(c) 7 T.R. 634. *notis.*

competent

competent jurisdiction of the matter, his judgment is conclusive till reversed or quashed." In the present case the whole argument has turned on that, which, under the circumstances, it was impossible to give in evidence, namely, that the vessel in question was not a boat; but supposing that this point might have been entered into at the trial, has any thing been stated to show that the vessel was not a boat? Upon such a point as this, dictionaries are certainly good authority, and Dr. *Johnson* calls a boat, "a ship of small size, as a passage boat, advice boat, fly boat." *Falconer's* marine dictionary says, "a boat is open or decked according to the purpose for which it is intended." On every ground, therefore, the rule for a new trial in this case must be discharged.

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BURROUGH J. Since I have been in *Westminster Hall*, it has never been doubted, that, where a magistrate has jurisdiction, a conviction, having no defects on the face of it, is conclusive evidence of the facts which it alleges. In the present case, by act of parliament the magistrate has jurisdiction over bum-boats and other boats; but, in the very exercise of that jurisdiction, he must make enquiry as to fact, and decide on all the evidence which comes before him; when he has done this, the conviction is conclusive as to the facts stated. Two cases have been much pressed on us, *Welch v. Nash*, and the bankruptcy case. I am astonished that any one, who has looked into the 13 G. 3. should press upon us *Welch v. Nash*. That was a case upon an order of justices touching the diverting a way; there was no litigant party, and the order was made upon hearing the evidence of one side only. Besides, the whole proceeding was irregular, there having been no plan of the road, which is expressly required by the statute. The order was not like a conviction, a proceeding *in invitum*.

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and was at all events bad upon the face of it. With respect to the bankruptcy case (a), a commission of bankrupt is, in its commencement, altogether an *ex-parte* proceeding behind the back of the party; and, therefore, has no application to a case, where the party brings forward his evidence and disputes before a magistrate, that which is urged against him. As to the hardship of there being no appeal in this case, if the legislature takes away appeal and *certiorari*, how can we interfere? It has often been said, that these summary jurisdictions should not be given without appeal, and the legislature have answered that an appeal is inconvenient in cases of such immediate urgency. Of the propriety of that, parliament is to judge, and not this Court. I have not the least doubt on this case. *Henshaw v. Pleasance* turned on the particular ground of a proceeding before the commissioners of excise.

RICHARDSON J. I am of the same opinion; whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming, that the fact, which the magistrate has to decide, is that which constitutes his jurisdiction. If a fact decided as this has been, might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case of a conviction under the game laws for having partridges in possession: could the magistrate in an action of trespass be called on to show, that the bird in question was really a partridge? and yet it might as well be urged in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case, that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the de-

(a) *Perkin v. Proctor*, 2 Wils. 382.

struction

struction of game, without being duly qualified to do so: after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present, we are not to look to the inconvenience, but the law: but, surely, if the magistrate acts *bonâ fide*, and comes to his conclusion as to matters of fact, according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged.

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Rule discharged accordingly.

ARNOLD v. REVOLUT. (a)

Nov. 26.

COVENANT on a lease for not repairing. The Plaintiff declared on an indenture between himself of the one part and *Revolut* of the other part. At the trial before *Park J. Croydon* Summer Assizes, 1819, the indenture produced was a lease of the wife's land, between the Plaintiff and his wife of the one part, and *Revolut* of the other part. It was objected that this was a fatal variance, and the Plaintiff was nonsuited.

Where a lease was stated in the declaration to be made by the Plaintiff on the one part, and *T. R.* on the other, but turned out, on evidence, to have been made by the Plaintiff and his wife on the one part, and *T. R.* on the other; held, (*Dallas C. J. absente*) that this was no variance.

Onslow Serjt. on a former day obtained a rule *nisi* to set aside this nonsuit and have a new trial, on the ground

(a) The reporters are indebted to the kindness of a gentleman at the bar for the note of this case.

that

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that the instrument had been correctly described in the declaration, (the rules of pleading only requiring, that the legal effect of an instrument should be given); and, that the covenants in the present lease, were in effect all covenants to the husband, as the wife's property vested in him, if not disposed of by settlement. He cited *Ankerstein v. Clark* (a), and *Beaver v. Lane* (b).

Taddy Serjt. now showed cause against the rule. The statement that the indenture was made by the husband, when in fact it was made by the husband and wife, constitutes a material variance; and the distinction is between cases where the act of the wife is void, and where it is merely voidable; where the act of the wife is merely voidable, she must be recognised as a contracting party, till the instrument by which she contracts is avoided by the refusal of her husband. *Gardiner v. Norman* (c), and *Shipwith v. Steed* (d). The granting of the lease by the wife, in the present instance, was clearly only a voidable act, the lands having been hers while sole; if she had survived her husband, the property in them would have survived to her, and she would have been liable upon her own covenants in this indenture. A lease, therefore, from the husband alone, might have been very different in effect, from a lease by the husband and wife; and it was material, that she should be described as a party to it, if such was really the fact (e). In *Aleberry v. Walby* (f), it appears from the objection raised in error, that the lease was described, in that action, as being between the husband and wife and another on one part, and the Court said, that the wife might be joined in the action at election. So

(a) 4 T. R. 616.

(d) Cro. El. 769.

(b) 2 Mod. 217.

(e) Bac. Abr. tit. Leases, C.

(c) Cro. Jac. 617.

(f) 1 Str. 229.

Howel v. Maine (a). The husband may, if he please, sue alone, but, if he undertake to describe the instrument, his description must accord with the fact. In *Beaver v. Lane* the objection was made after verdict in arrest of judgment, and not, as in the present case, at *Nisi Prius*. Neither can it be collected from that case, that the deed, on which the action was brought, was set out in the declaration by way of description of the particular instrument, as having been made by husband and wife of the one part, but merely, that the Defendant held according to the form and effect of a certain indenture between the Plaintiff of the one part, and the Defendant of the other part. Further, the covenant in *Beaver v. Lane* was said to be concerning the husband's houses, whereas in the declaration in the present case, the property is shown to be in the wife. The case of *Ankerstein v. Clark* is inapplicable on the present occasion, because the bond given to husband and wife, which was the subject of that action, vests in the husband and his personal representatives absolutely, and does not survive to the wife like her chattels real. Her interest in that case, was not such as to make it proper to join her in the action.

PARK J. This case was taken by surprise at *Nisi Prius*: on the general law of it, there can be no difference of opinion. *Beaver v. Lane* goes to the very point, and is confirmed by *Ankerstein v. Clark*. But, it is said, there is a variance between the instrument declared on, and that produced in evidence. I think there is no variance, because the wife had only a chattel interest in the lands before marriage, and that interest vesting in the husband, the covenants made to husband and wife

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(a) 3 *Levinz.* 403. See also *Selw. N. P.* 310. 2d edit.

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must, in legal effect, be deemed covenants made to the husband alone.

BURROUGH J. Where a deed is falsely described, an objection may be taken; but a party may always declare according to the legal effect of a deed, and under that rule the allegation in this instance is perfectly correct. A promissory note made to the wife, may be described as a note made to the husband.

RICHARDSON J. I think this is no variance: and I rely, principally, on the case in the Second Modern Reports. There it was held, that the husband might refuse as to his wife and sue alone, and he may do the same here. This is no more a variance than in the case of bonds and promissory notes, when they are made to the wife, and declared on as made to the husband, which has always been held allowable.

DALLAS C. J. absent.

Rule absolute.

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WELLS v. GIRLING.

Nov. 27.

ASSUMPSIT against the Defendant as one of the makers of a promissory note, of which the following is a copy.

“ *London, 9th June, 1817.*

“ We jointly and severally promise to pay to Mr. *John Wells*, or order, the sum of 87*l.* 3*s.* in manner following, viz. the sum of 21*l.* 15*s.* 9*d.*, on the 29th day of *September* now next ensuing, the further sum of 21*l.* 15*s.* 9*d.*, on the 25th day of *December*, now next ensuing, the further sum of 21*l.* 15*s.* 9*d.*, on the 25th day of *March*, 1818, and the further sum of 21*l.* 15*s.* 9*d.* on the 24th day of *June*, 1818; and in case default shall be made in payment of any or either of the above sums, at the times above limited for that purpose, then we jointly and severally promise to pay, the whole of the said sum of 87*l.* 3*s.*, or so much thereof as shall not have been paid immediately after such default as aforesaid.

“ *W. Bath.*

“ *S. Girling.*”


At the trial before *Dallas C. J.* at the *Westminster* sittings in this term, it appeared that on the 11th *May*, 1816, the Plaintiff, who with a partner, named *Waring*, carried on the business of a brewer, lent to *Bath*, a

composition with them. Held, that the transaction was fraudulent and void, and that Plaintiff could not recover on the note against the Defendant.

On the 11th of *May*, 1816, *A.* borrows of *B.* 80*l.* On the 9th of *June*, 1817, *A.* and *C.* give *B.*, for that loan, a note of hand for 87*l.* 3*s.*, payable by four instalments; viz. on the 29th of *September* and 25th of *December*, 1817, and the 25th of *March* and 24th of *June*, 1818, with an agreement that the whole 87*l.* 3*s.* should be payable on default of any one instalment. Held, that the agreement was not usurious,

A., a trader, in embarrassed circumstances, being indebted to Plaintiff for money lent, and goods, Plaintiff promised, to induce *A.*'s creditors to agree to a composition on condition of *A.*'s giving the Plaintiff a promissory note for the money lent, signed by *A.* and another as security: the note was given by *A.* and signed by defendant, as security; the Plaintiff and *A.* agreed to keep the matter a secret from *A.*'s creditors, and the Plaintiff endeavoured, but in vain, to accomplish a

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publican, the sum of 80*l.* In 1817, *Bath* became embarrassed : at this period, among other debts, he owed to the Plaintiff the above 80*l.*; he also owed to the house of *Waring and Wells*, 93*l.* 6*s.* 10*d.* for beer. In order to get security for his debt of 80*l.*, the Plaintiff promised *Bath*, that (in the event of the last-mentioned debt, with interest thereon from the 11th *May*, 1816, being secured) he (the Plaintiff) would obtain the consent of all the other creditors of *Bath*, to take a composition of 5*s.* in the pound for their debts. The Defendant then became security for *Bath*'s debt of 80*l.*, with interest thereon from *May*, 1816, and signed the above note at the house of the Plaintiff's attorney. It was agreed by the Plaintiff and *Bath*, that this transaction should be concealed from the other creditors, and accordingly it was concealed. After the security had been given, the Plaintiff proceeded to call on some of *Bath*'s creditors, and endeavoured to induce them to enter into a composition of 5*s.* in the pound, but did not succeed. On the 28th *November* following, the Plaintiff sued out a commission of bankruptcy against *Bath*, founded upon the debt due to himself and partner of 93*l.* 6*s.* 10*d.*, and the private debt due to himself, the subject of the above-mentioned note, and was chosen assignee. The Plaintiff proved his debt on the note, and *Bath* obtained his certificate, dated 1st *November*, 1818. The counsel for the Defendant contended, that this transaction was void on two grounds ; first, as being usurious ; secondly, as being a fraud on the creditors of *Bath*, a preference having been given to one creditor as the secret price of his endeavouring to induce the rest to enter into a composition. The jury found a verdict for the Plaintiff : leave was, however, given, to move to set the verdict aside, and enter a nonsuit on these two grounds. Accordingly,

Blosset Serjt. in moving for the rule contended, that
 if,

if, according to the terms of the note, the whole 87*l.* 3*s.* had been paid upon a failure of the first instalment or any instalment prior to the last, a part of the 7*l.* 3*s.* which constituted the interest of the 80*l.* from the 11th of May, 1816, to the 24th of June, 1818, would have been paid before it became due as interest, and therefore the contract was usurious. He cited 2 *Hawk. pl. cor. tit. Usury*, and *Morse v. Wilson* (a).

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But the Court being unanimously of opinion that this was a common stipulation for a penalty in case of a default, and not a usurious contract, granted the rule only on the ground that the transaction was a fraud within the bankrupt laws.

Vaughan Serjt. now showed cause. The Defendant is a surety with full knowledge of the circumstances of the case, and cannot now defeat his own instrument. The transaction is neither a fraud on the creditors, nor a diminution of the bankrupt's estate; on the contrary, it operates in relief of the estate, and consequently in aid of the creditors at large; but for the Defendant's note, *Bath's* debt of 87*l.* 3*s.* would have been chargeable on *Bath's* estate, to the diminution of the funds disposable for the benefit of the creditors, which funds are relieved in proportion to the payment of the 87*l.* 3*s.* by the Defendant as surety. Without going through all the cases, the principle laid down in *Cockshott v. Bennett* (b), is, that when creditors are induced to accept a composition under the expectation that they shall all share alike, and one of them contrives by any means to obtain more than his share of the debtor's property, the means resorted to, are fraudulent and void; but here, there was

(a) 4 T. R. 353: *verba Ashburst J.*

(b) 2 T. R. 763.

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no composition, and the principle does not apply. The Plaintiff here, does not appropriate, or attempt to appropriate to himself, any part of the debtor's property, or touch the fund disposable for the benefit of the other creditors. With respect to goods furnished, he offers to stand on the same footing, and sign the same composition as the other creditors; all he requires and obtains, is the personal security of one of the debtor's friends, for money actually advanced a twelvemonth before. The case of *Wheelwright v. Jackson* (a), is stronger than the present, and will doubtless be decisive of it. In *Wheelwright v. Jackson*, as in the present case, a deed of composition though intended, was not executed, and that forms the ground-work of Chief Justice *Mansfield's* judgment. The Plaintiff had obviously no intention of touching any funds which could go to the other creditors; it is too much, therefore, to say, that the Defendant can now come before the Court, and call the security which he has given, a fraud upon the other creditors.

Blosset in support of the rule. In all the cases, the party concerned has been allowed to raise the objection on which the Defendant relies. There is scarcely an instance in which he may not insist on the illegality of the transaction. This is the principle recognised in all cases of usury, in racing cases, and cases of illegal wagers and games generally. *Wheelwright v. Jackson* is, as far as it goes, an authority for the Defendant, for it is there laid down, that if the question had turned on the composition proposed, the transaction would have been deemed fraudulent. But that case went wholly on a different ground, the question arising as between assignees of a bankruptcy, which took place unexpectedly, and a party who had received notes and bills of ex-

(a) 5 Taunt. 109.

change from the bankrupt. That was not an action to enforce an agreement, but to recover damages for the conversion of instruments, to which, while they were in his possession, the Defendant had at least as good a title as the Plaintiff; though, if never having possessed them, he had sued the Plaintiff, he might have sued in vain; and so here, if the Defendant had actually paid this bill, he could not perhaps have again recovered the amount; but the principle "*in pari delicto potior est conditio possidentis*" applies to both cases. If the case of *Wheelwright v. Jackson* had been an action by the bankrupt himself or his assignees to enforce an agreement, and had been so declared on, is there any thing in that case to justify the conclusion that such agreement would have been enforced? Whether or no the composition was actually entered into in the present case, is immaterial; the question is, whether the transaction was meant as a fraud upon the other creditors. The Defendant urges that the creditors' fund was increased, but if this composition had been carried into effect how would the matter have stood? *Bath's* debt was to be paid to the Plaintiff in full; he was to have twenty shillings in the pound, the rest of the creditors five shillings. Is not this a gross fraud? How was the Plaintiff to induce the creditors to consent to a composition, but by representing to them that he too was a creditor, and willing to agree to the same terms? The whole transaction too, between the Plaintiff, the Defendant, and *Bath* was to be kept secret. Why? Clearly that the rest of the creditors might believe that the Plaintiff stood in *pari passu* with them. The result of the case is, that it falls completely within former decisions. In *Jackman v. Mitchell* (a), the whole case turns upon the concealment, and the public policy to be pursued on such occasions. In *Jack-*

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(a) 13th Ves. Ir. 586.

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son v. Lomas the principle is thus laid down by *Buller J.* "The general principle is, that a secret agreement of this kind, made between the insolvent and some of the creditors, in order to induce the rest of the creditors to agree to the composition, is void (a)." The same principle is laid down by Lord *Ellenborough* in *Leicester v. Rose*. "Where the creditors in general have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself (b)." Now, in this case, a particular creditor, one of a large number, reaps a peculiar benefit. *Cockshott v. Bennett* contains the same principle. There, indeed, something was done under the agreement, but it is the agreement itself, and not what is done under it, that must raise the question.

DALLAS C. J. In this case, the first question is, whether this agreement was fraudulent in its creation, and that depends upon the facts. *Wells* was a creditor of *Bath*, and before *Bath* became bankrupt, *Wells* and his partner furnished *Bath* with goods to the amount of 93*l.* 6*s.* 10*d.* *Bath* was also indebted to *Wells* in a sum of 80*l.* on a separate account. *Bath* becoming embarrassed, a question arose, whether an application should not be made to his creditors at large. Upon this, *Wells* being fully apprised of *Bath's* embarrassment, says, pay me, or give me security, and I will speak to the creditors, to induce them to enter into a composition. The promissory note, which is the foundation of this action, was then given; and we must take this with us, that it was insisted by *Wells*, that this transaction should be kept secret. Now, what was *Wells* to do? He was to induce the rest of the creditors to sign the deed of composition, in the confidence, that they were

(a) 4 T. R. 170.

(b) 4 East. 381.

sharing equally with him the property of *Bath*; whereas he himself had secured the full payment of a debt of his own, as the price of his interference. These facts do not leave much doubt as to the fraud of the case. If, then, the agreement is fraudulent, it is void; and I am at a loss to understand, how an agreement void in its creation, can cease to be void from subsequent circumstances. If, therefore, it were not for one difficulty which I feel, I should think on the authority of all the cases, that the Plaintiff cannot be entitled to recover in this action. That difficulty does not arise from the case of *Wheelwright v. Jackson*, but from what is said by the Chief Justice in delivering his judgment. It is my opinion, as at present advised, that a nonsuit must be entered in the present case; and if, on looking into the case of *Wheelwright v. Jackson*, I should find reason to alter that opinion, I shall mention this case again.

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PARK J. I am of opinion, that this is a case of fraud. The cases of *Jackson v. Lomas* and *Leicester v. Rose* are decisively in favour of this opinion, and it is impossible to say, that this note can stand under the authority of those cases. The instrument is void in its creation, and how can it be said, that in any subsequent stage of its existence, it can become valid? It is useless to go further into the case, as his lordship has stated it so accurately. The case of *Wheelwright v. Jackson* has come before us for the first time, and the expressions used in the judgment of that case, may require a little consideration; at present, I am of opinion, that a nonsuit must be entered.

BURROUGH J. I think this a fraudulent transaction, and all the cases from *Cockshott v. Bennett* to the present time sanction such an opinion.

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RICHARDSON J. I am of opinion, that the consideration in this case is fraudulent and illegal, and, therefore, that the action cannot be supported. The fraud is, that a favoured creditor, by undertaking to procure a settlement with the body of creditors, obtains a secret preference. This case is distinguishable from *Wheelwright v. Jackson*, where the transaction was not at all in contemplation of bankruptcy, though that event happened afterwards to take place. The Court held there, that the contract was executed, and that they could not assist the assignees. The Plaintiff, here, does not come into Court with clean hands, and the whole transaction is vitiated by fraud.

DALLAS C. J. Afterwards stated that he had looked into the case of *Wheelwright v. Jackson*, and that his doubts were removed. The rest of the Court intimating the same opinion,

The rule to enter a nonsuit was made

Absolute.

No 27.

JOHNSTON v. BENSON.

By bill of lading, a ship-owner undertook, that goods should be delivered

ASSUMPSIT against a ship owner, on an undertaking to deliver goods at *Buff Bay, Jamaica*. Breach, non-delivery. At the trial before *Dallas C. J.* (*London sittings in Michaelmas term, 1819,*) it appeared, that the safe, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto*, excepted." The goods having been dispatched from the ship, in her boat, according to the usual course of trade in the *West Indies*, were, together with the boat, lost in a hurricane. Held, that the ship-owner was not liable, under the terms of the bill of lading, to make good the loss.

Plaintiff

Plaintiff shipped on board the Defendant's vessel five boxes of merchandise, to be delivered to consignees at *Buff Bay*. A bill of lading, of which the following is the substance, was signed by the master of the ship.

" Shipped by the grace of God, &c. in good order and well conditioned, &c. in the good ship called the *Fortitude*, whereof, by, &c. now riding at anchor in the river *Thames*, and by God's grace bound for *Buff Bay, Jamaica*, to say, five boxes, containing merchandise on account and risk of Mr. *Thomas Johnston*, being merchant, &c. and are to be delivered in like good order, &c. at the aforesaid port of *Buff Bay*, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted,) unto Mr. *Thomas Johnston*, &c. &c. In witness, &c. &c.

" *James Smith.*"

The *Fortitude* arrived at *Annotta Bay, Jamaica*, which is beyond *Buff Bay*, to the westward, on 31st *January*, 1818, and there she continued delivering her outward bound cargo. On the evening of the 6th *March* following, she dispatched her *shallop*, which was coopered and partly decked, with four seamen, to convey the goods in question to *Buff Bay*. When the *shallop* left the *Fortitude*, the weather was fine, and she anchored in *Buff Bay* about half past nine the same night, with two anchors and chain cables. Shortly afterwards it came on to blow, and a heavy swell setting into the bay, at half past two on the following morning, the *Shallop* parted from her anchors, and was dashed to pieces on shore; the goods were so much damaged as to be sold at a public sale for a trifling sum. It appeared, that it was the usual course of the *West India* trade, to deliver goods in boats or droghers, and that the conduct of

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the master in this particular instance, was in no wise different from the usual custom of such trade. The jury found a verdict for the Defendant: liberty was, however, given to the Plaintiff, to move to set aside the verdict for the Defendant, and enter a verdict for the Plaintiff, for the sum of 82*l.*, (the value of the goods in question) upon a point raised by the language of the bill of lading, as to the liability of the Defendant to risk in boats. Accordingly,

Taddy Serjt. Having on a former day obtained a rule *nisi*,

Leas Serjt., now showed cause against the rule. The clear object of this bill of lading, however ambiguously and inartificially drawn, was, that the owner of the *Fortitude* should be liable to the risk of the goods in boats, only so far as ships are usually liable for risk in boats. Now, the liability of ships or ship-owners for risk incurred in boats stands precisely on the same footing as their liability for risk incurred in ships; and with respect to merchandise, the ship-owner's liability for risk accruing to it in ships, extends only to cases of carelessness, or unskilful stowage, and not to loss or damage from the effect of weather. The provision was only inserted in the bill of lading for the shipper's greater security, lest it might have been urged, that the ship-owner is not only not liable for the same species or amount of risk in boats, as he is liable to in ships, but that without such express provision, he is not liable for risk in boats at all.

Taddy in support of the rule. The old form of exception in a bill of lading was "the dangers of the seas excepted;" then came the case of *Smith v. Shepherd* (a),

(a) *Abbott on Shipping*, 4th Ed. p. 263. *notis.*

and

and in consequence of the alarm excited among the ship owners by that decision, the exception has been from that time usually "the act of God, the king's enemies, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted (a)." If the exception had so remained in the present bill of lading, the Plaintiff would have been pressed to establish his claim. But it struck merchants trading to the *West Indies*, (where the course is to deliver goods from a distance, in droghers or boats,) that the ship owners, under this general exception, would not be responsible for any risk, at all, in boats, and that goods might therefore be lost in boats, from the want of a motive in the ship owner to guard against the contingencies of bad weather, or to exercise caution in sending out his boats only at proper seasons; they therefore introduced a saving, rendering the owner liable as to goods conveyed in boats, for all the risks occurring from such perils as ships are usually exposed to (b). To construe this saving in the manner contended for by the Defendant, would be to leave the rights of the parties exactly as they stood before the introduction of the saving. If the saving were meant to impose upon the owner the same liability in the case of delivery by boats, as he would have incurred if the goods had remained on board ship, nothing would have been more easy than to have added to the exception, the words "whether in ships or boats" instead of carefully introducing a saving which seems evidently intended for the benefit of the shipper. In *Bennett v. Kensington* (c), the contest was upon the effect of a saving out of an exception, and Lord *Kenyon* there says, "If a general provision be made in any deed or instrument, and it is there said, that certain things shall be excepted, unless another thing happen which

(a) *Abbott on Shipping*, 4th Ed. p. 226.

(b) *Ibid.*

(c) 7 T. R. 210. s.c. *Park's Insurance*, 7th Ed. 190.

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gives effect to the general operation of the deed, if that other thing do happen it destroys the exception altogether." The Court in that case adopted a strict legal construction, and enquired into the true sense and grammatical meaning of the policy, and Lord *Kenyon* referred to his reasoning in *Nesbitt v. Lushington* (a). Both in legal and grammatical construction, the word "thereto" in the present bill of lading, must refer to "the perils of the seas," as its last antecedent; for, it cannot, with strict precision, be said, that ships are liable to risk of boats, though ship owners may be so.

DALLAS C. J. The wording of the instrument in question is very obscure, and it is this obscurity which has given rise to the cause now before the Court. The counsel for the Plaintiff observed, that no argument was adduced by his opponent, nor was any argument necessary; for the reason of the thing is apparent on the face of the instrument: upon reading the bill of lading, there can be but one construction put upon it. The exception was taken by the owners of ships, and the alteration from the old form of the bill of lading was intended to be in their favour; to limit their responsibility, not to extend it. How does this saving stand? The words which compose it, "save risk of boats so far as ships are liable thereto," are evidently intended to place the owner's liability to the shipper in the matter of boats, on the same footing as it stood with regard to ships. When goods stowed in boats by the usual custom of the trade, are lost by the dangers of the sea, there is no reason why the ship-owner should be held liable, when he certainly would not have been liable, had the goods been lost by such dangers, on board the ship. The exception originally stood thus, "the dangers of

(a) 4 T.R. 787.

the seas excepted." The case of *Smith v. Shepherd* is supposed to have caused the introduction of the exception, which has prevailed since that time, namely, "the act of God, the king's enemies, fire, and all and every other dangers, and accidents of the seas, rivers, and navigation; of whatever nature and kind soever, excepted;" and to this exception the imperfectly worded saving, which forms the question here, is now added. It is not necessary to say how far the liability of the ship owner to risk in boats may extend, nor to enquire what would, or would not, be considered the act of God in case of the loss of the boat. It is sufficient, in this case, to say, that the boat, in which the goods, according to the custom of the trade were conveyed, was lost by dangers of the sea; and that, had they been lost on board the ship, the owner would not have been liable. Under this saving, ship owners may be liable for losses in boats in some cases, but certainly not to losses which arise from the dangers of the sea. I am, therefore, of opinion that this rule must be discharged.

PARK J. I am of the same opinion: the instrument is drawn in a bungling manner; but still it is sufficiently clear to show that the intention was not to make the ship owner liable to losses in boats, arising from the dangers of the seas; though it left him liable to certain risks in boats, namely, risks of the same kind as those to which he was liable in ships.

BURROUGH J. It appears to me, that by transposition this saving may be made perfectly plain. If it had been the meaning of those who inserted the saving, that owners should be liable for risk incurred in boats, at all times, and from all causes, the simple saving "of risk of boats at all times and in all cases" would have been the obvious form of words to be used; but the risk saved out of
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the exception, is risk of boats so far as ships are liable to risks: now ships or ship owners are not liable for losses by dangers of the sea, and, therefore, I am of opinion that the rule obtained by the Plaintiff must be discharged.

RICHARDSON J. I think the words of the bill of lading imperfect and obscure, but they do not entail on the ship owner a larger responsibility than that, to which he was before liable. This liability to risk in boats is restricted to his liability to risk in ships, and the restriction is formed by the words, "so far as ships are liable thereto." The saving does not take boats altogether out of the exception, in favour of the ship owner, contained in the bill of lading; but has the effect of leaving his responsibility with respect to boats, the same as it was with respect to ships.

Rule discharged.

Nov. 29.

BENDYSHE v. PEARSE.

Certain referees were ordered by Act of Parliament to ascertain the amount of a yearly corn-rent, and the court of quarter sessions was ordered to declare the amount.

REPLEVIN. The Defendant avowed for the arrears of a corn-rent, and the jury found a verdict for the Defendant at *Cambridge* spring assizes 1817, subject to the opinion of the court on a special case, which, among other facts, stated, That the corn-rent in question was given by an enclosure act, in lieu of tithes: that certain referees, to be appointed according to directions in the act, were to ascertain the average price of a bushel of

The referees having made their report to the court of quarter sessions, the Court ordered it to be filed. Held, that this was no declaration by the court of quarter sessions, of the amount of the corn-rent.

The commissioners under an enclosure act, having made minutes of their proceedings, Held, that parol evidence of the divisions and allotments was inadmissible, the minutes of the commissioners not being produced or accounted for.

wheat,

wheat, in the week after the close of Easter, next after the expiration of fourteen years after the divisions and allotments under the enclosure should be made and finished, and the exact amount of the yearly corn-rent was to be declared by an order of the quarter sessions :

That the commissioners for the enclosure made their award the 20th *October*, 1800 :

That referees to ascertain the average price of the bushel of wheat were, upon motion, appointed at the *Cambridge Easter* sessions, 1814 :

That the referees delivered their report into court, and the same was ordered to be filed :

The Plaintiff objecting that the application to the quarter sessions was not made in proper time, the Defendant contended that the division and allotments were made and finished according to the act, in *September*, 1799.

The minutes of the proceedings of the commissioners were left in the custody of one of the commissioners, who is since dead. They were not produced by the Defendant, nor was any evidence given of any search or enquiry for such minutes at the house, or among the papers of such commissioner, before or since his death, nor was any proof given of the minutes being destroyed. But in order to shew, that the division and allotments were made and finished on or about the summer of 1799, the Defendant proved, that a certain parchment, which was produced, under the hand of the commissioners, was affixed to the church door of the parish, about the month of *September*, 1799. This parchment purported to be a rate for the expences of the enclosure. It was also stated by a witness, who kept private notes of what was done by the commissioners, that the setting out of allotments was finished in the spring of 1799. But he admitted, that alterations were made in the summer of that year, and, in particular, that a road was set out

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out over the plaintiff's allotment. It did not appear whether the witness had composed the notes at the time of the enclosure, or afterwards. The following questions (the only ones on which the court pronounced an opinion) were among others submitted for the opinion of the court. 1st, "Whether there was any legal evidence whatever given of the division and allotments being made and finished in any other mode, or at any other period than in and by the execution of the award? 2dly, Whether the order of sessions for filing the report of the referees is such an order as is required by the act of parliament, declaring the amount of the yearly corn-rent in the manner therein directed?"

Frere Serjt., for the Plaintiff. There were minutes of the proceedings of the commissioners, and they ought to have been produced or accounted for, while they existed; parol evidence of the acts of the commissioners could not be adduced. The witness who gave evidence, produced his own notes; but it does not appear when they were composed, or whether he spoke from his own knowledge, independently of the notes. The notice on the church door was only a notice of a rate, and had nothing to do with the allotments; it might be evidence of the rates, but could not be evidence of the allotments. The order of sessions was not an original order declaring, as by the authority of the sessions, the amount of the corn-rent; but only an order that the report of certain referees should be filed. There exists, therefore, no order of sessions whatever on the subject of the amount of the corn-rent.

Blosset Serjt. contra. The minutes of the commissioners were only evidence of their own contents, and not of the act *in pais*, namely, the marking out and dividing the several allotments by stakes and furrows; that could

could only be proved by a witness who saw it done; the witness in the present instance states positively that this was done in 1799, and even admitting that his notes were made afterwards, it does not follow that he was not present at the marking out of the allotments. As to the order of sessions, the Court by ordering the report of the referees to be filed, adopted that report, and on being filed, it became the order of the court.

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Dallas C. J. now delivered judgment.

On the trial of this cause, a case was reserved for the opinion of the Court. At the foot of the case, four questions are stated. But it is unnecessary to do more than to give our opinion on the third and fourth. Indeed, the opinion we have formed on the fourth question, is decisive of the cause in favor of the Plaintiff; but we think it right to declare our opinion on the third question also. First then, as to the fourth question. It is, whether the order of the *July* sessions for filing the report of the referees, is such an order as is required by the act, declaring the amount of the yearly corn-rent in the manner therein directed? The act directs that the referees shall make their report to the quarter sessions; and that the *exact amount* of the said yearly corn-rent, or the sum to which it should be increased or diminished, should be declared by the order of the said Court. The case states that the referees made their report, by which it appears, that the corn-rent was increased to the sum for which the distress was taken; but it appears a fact on the case reserved, that all the sessions did, was to order that the report be filed. There is nothing equivocal in this order: it is a *simple* direction that the report be placed on the files of the Court. We cannot construe this to be an order *declaring* the *exact amount* to which the corn rent was to be increased.

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The Court of quarter sessions does not appear to have exercised any judgment on the subject. They have merely received and filed the report: on this issue, therefore, we think the Plaintiff entitled to judgment. The third question is, whether there was any legal evidence given of the division and allotments being made or finished in any other mode, or at any other period, than in and by the execution of the award? Our opinion on this question, is, that there was no such evidence. From the words of the act, the division and allotments are to be final, and conclusive, when contained in an award or instrument in writing. From the nature of the subject, and from constant practice under the inclosure acts, the allotments must be in writing. It was incumbent on the Defendant to prove, that the division and allotments were made at an earlier period, than by the award. The proceedings of the commissioners would have been the legal evidence of this fact. It was stated in the case, that there were such proceedings, and that they were left in the custody of one of the commissioners, who is since dead; that they were not produced by the Defendant, nor was any evidence given of any search, or enquiry, at the house, or among the papers of such commissioner, before or since his death, nor was any proof given of the minutes being destroyed. We think, that the Defendant appears not to have had any ground whatever, for being let in to give the evidence, by which he proposed to prove, that the division and allotment were made at an earlier period, or at any other period than by the award. We think, that no part of the evidence offered for this purpose, was admissible; and, therefore, it is not material to observe on the effect it ought to have had, if it had been admissible. The judgment of the Court, therefore, is, on the whole case, for the Plaintiff.

Judgment for the Plaintiff accordingly.

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BENNETT v. COSTER.

Nov. 29.

TRESPASS. First, count for breaking and entering Plaintiff's close, covered with water, and carrying away his fish there found. Second, for breaking and entering Plaintiff's several fishery, fishing there, and carrying away his fish. Third, for fishing in the Plaintiff's free fishery, and carrying away his fish. Fourth, for catching and carrying away Plaintiff's fish. *Pleas*, first, not guilty. Issue thereon. Second, that the taking of fish in the first and last counts mentioned are the same taking; that the close covered with water in the first count mentioned is the close of one *W. A.*; and that Defendant fished as his servant. Third, that the several fishery in the second count mentioned is the several fishery of *W. A.*, and that Defendant fished there as his servant. Fourth, that the free fishery in the third count mentioned is the free fishery of *W. A.*, and that Defendant fished there as his servant. *Replication.* On the second plea, new assignment, setting out the abutments of Plaintiff's close covered with water, and specifying the exact spot of the Defendant's trespass. On the third, traversing the Defendant's several fishery. Issue thereon. On the fourth, traversing his free

Trespass: four counts; for fishing in Plaintiff's close covered with water, several fishery and free fishery, and carrying away Plaintiff's fishes. *Pleas*, first, not guilty; second, that the close belongs to *W. A.*, Defendant's master; third and fourth, that the several and free fishery belong to *W. A.* New assignment, setting out abutments of Plaintiff's close, and replication traversing *W. A.*'s several and free fishery. *Pleas* to new assignment: first,

not guilty; second, that *locus* newly assigned is the close of *W. A.*; third, that *W. A.* has common of fishery over the *locus* newly assigned.

The issue on the common of fishery was found for the Defendant; as, also, that part of the first issue which related to the second, third, and fourth counts of the declaration. The other issues were all found for the Plaintiff with 1*s.* damages, and 40*s.* costs on the first count.

The Court confirmed the taxation of the prothonotary, who had allowed the Defendant general costs in the cause on the issues found for the Defendant, and the Plaintiff the costs of the issues found for the Plaintiff.

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fishery. Issue thereon. *Pleas* to new assignment, first, not guilty. Issue thereon. Second, that the *locus* newly assigned is the close of *W. A.*, and that Defendant fished there as his servant. Third, claiming a common of fishery for *W. A.*, and all whose estate he has, over that part of the close in the new assignment mentioned, in which the trespass is alleged to have been committed, and that Defendant fished there as servant of *W. A.* and by his command. *Replication* to the second plea to new assignment, traversing that the *locus* newly assigned is the close of *W. A.* Issue thereon. To the third plea to new assignment, traversing *W. A.*'s alleged common of fishery over the *locus* newly assigned. Issue thereon.

Postea. As to so much of the issue first joined, as relates to the trespasses in the first count of the declaration mentioned, Defendant guilty, damages 1s., costs 40s.; as to the residue of the premises in the first issue, as to the 2d, 3d, and 4th counts of the declaration, Defendant not guilty; as to the issue secondly joined, that the several fishery, in the second count of the declaration mentioned, is the several fishery of the Plaintiff, and not the several fishery of *W. A.*; as to the issue thirdly joined, that the free fishery in the third count of the declaration mentioned is the free fishery of the Plaintiff, and not the free fishery of *W. A.*; as to the issue fourthly joined, as to the trespasses by the Plaintiff newly assigned, Defendant guilty; as to the issue fifthly joined, that the close in the second plea to the new assignment mentioned, is not, nor at the several times when, &c. was the close of *W. A.*; as to the issue sixthly joined, that *W. A.* and those whose estate he hath, from time immemorial have had, and *W. A.* still of right ought to have a common of fishery in the close, in the last plea to the new assignment mentioned, and ought by themselves and their servants of right to catch and

and carry away fish at all times of the year, as belonging to the land.

The prothonotary, on taxing costs, allowed the Plaintiff, on the issues found for him, the costs of those issues; and the Defendant, general costs in the cause on the issues found for the Defendant. He did this on the authority of *Vivian v. Blake* (a).

Lens Serjt. upon a former day obtained a rule *nisi* for the prothonotary, to review his taxation of the Defendant's costs, and to tax costs for the Plaintiff. He cited *Trotman v. Holder* (b).

Pell Serjt., in shewing cause against the rule, had proceeded to the end of his statement of the pleadings, when *Lens*, finding that *Vivian v. Blake* had not been adverted to in *Trotman v. Holder*, and that the inclination of the Court was now against him, withdrew his motion, and his rule was discharged without costs. (c)

(a) 11 *East*. 263.

(b) *Ante*, 222.

(c) In *Vivian v. Blake* there was no new assignment, and ver-

dict for the Plaintiff on that new assignment, as in *Trotman v. Holder* and *Benett v. Coster*.

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BREACH, Demandant; HEWITT, Tenant;
BRIERLY, Voucheé.

The Court will not entertain motions on the subject of fines and recoveries the last day of term.

The affidavit of the consent of a feme covert ought not to be separate.

IN this recovery the wife had been examined separately as to her consent, by a commissioner in the country, but no affidavit of that fact was filed when the other proceedings were had.

Taddy Serjt. moved that an affidavit of the separate examination having then taken place, might now be filed.

Sed per Curiam. The affidavit ought never to be separate, and the Court will not entertain motions on the subject of fines and recoveries the last day of term; nor is the rule confined to amendments. The inconvenience of entertaining motions in such matters, appears strongly in the present case, where a serious matter is moved on loose information, the accuracy of which might have been enquired into if the parties had come in time.

Taddy took nothing by his motion.

REGULA GENERALIS.

It is ordered, that from and after Thursday, the 11th day of *Nov.* instant, every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which, according to the present practice, such notice ought to be served; except where an order of the Court for further time shall have been obtained, in which case, it shall be sufficient to serve the notice before three o'clock in the afternoon of the day, on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day, at which such notice shall have been served.

November 6.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1820.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Sixtieth Year of the Reign of GEORGE III. and
First of GEORGE IV.

MEMORANDA.

IN this term, on the 29th of *January*, at half an hour past eight o'clock, *p. m.* died His Majesty King *George* the Third in the eighty-second year of his age, after a reign of fifty-nine years, three months, and four days. His late Majesty was succeeded by His present Majesty King *George* the Fourth, who, on *Monday* the 31st *January*, was proclaimed King of the United Kingdom of *Great Britain* and *Ireland* with the usual solemnities.

The Lord Chief Justice and the other three Judges of the Court of Common Pleas, on the 1st of *February* following, (the first day of their meeting in that court after the death of His late Majesty,) took the oaths of allegiance to His Majesty King *George* the Fourth, together with the oaths of supremacy and abjuration, and made the declaration against transubstantiation; and,

On the 3d of *February* His Majesty's serjeants, together with Mr. Serjeant *Heywood* and Mr. Serjeant *Marshall*,
VOL. I. K k shall,

1820. *shall, (the former gentlemen as one of the Chief Justices, and the latter as one of the Justices for the Great Sessions of Wales,) took the same oaths, and made the same declaration.*

The following gentlemen who had received patents of precedence in the last reign, viz. *John Fonblanque, Esq., Thomas Jervis, Esq., Charles Wetherell, Esq., and Robert Matthew Casberd, Esq.,* on the 1st February, took their seats without the bar, their patents having expired on the demise of His late Majesty.

Shortly after the end of the term, new patents of precedence were received by *John Fonblanque, Esq., Thomas Jervis, Esq., and Charles Wetherell, Esq.;* and *Robert Matthew Casberd, Esq.* was appointed one of His Majesty's Counsel. The gentlemen last above named took their seats within the bar accordingly.

In this term, *Thomas Peake, of Lincoln's Inn, Esq.,* barrister at law, was called to the degree of Serjeant, and gave rings with the motto "*Æquâ Lege.*"

A few days after the end of this term, at his house in *Russell Square,* died that eminent and acute lawyer, *Sir Vicary Gibbs, Knight,* late Chief Justice of this Court.

January 29. CHARLES MORGAN and ELIZABETH MORGAN,
Conusees.

The Court refused to pass a fine where the affidavit, taken before a commissioner abroad, was written on paper.

TADDY Serjt. moved that this fine might pass. The objection was, that the affidavit sworn before the commissioner at *Archangel* in *Russia* was upon paper instead of parchment.

3
Both

Both sides of the paper being written upon, so that it was impossible to preserve the affidavit in a legible state by pasting it on parchment,

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MORGAN,
Counsec.

The Court refused the application, and *Taddy* took nothing by his motion.

(IN THE HALL OF SERJEANTS' INN(a).)

The KING v. FRANCES CLARK.

January 31.

AT the *Devon* Summer assizes, 1819, the prisoner was indicted "for that she, contriving, one *George Lakeman*, with oil of vitriol, feloniously, &c. to kill and murder, upon, &c. at, &c. in and upon the said *G. L.*, a base born infant male child of tender age, did make an assault, and did then and there feloniously, &c. give and administer to the said *G. L.*, a large quantity of oil of vitriol, and did then and there feloniously, &c. force and compel the said *G. L.* to take into his mouth and throat a large quantity of the said oil of vitriol, (she, the said *F. C.* then and there well knowing, that the said oil of vitriol, so by her then and there feloniously administered to the said *G. L.* as aforesaid, would occasion the death of the said *G. L.*;) and that the said *G. L.* whereby the child became sick and distempered in his body, and by that sickness languished and died: Held, a good bar to an indictment (1st count), for murdering the same child by administering a large quantity of oil of vitriol, and forcing the child to take into his mouth and throat a large quantity of the said oil of vitriol, knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling, occasioned thereby, languished and died; (2d count) for murdering the child by administering a certain acid called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder, occasioned thereby.

(a) Before eleven Judges, *Wood*, Baron, absent.

K k 2

after-

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afterwards, &c. by the said force and compulsion of the said *F. C.* *did take into his mouth and throat* a large quantity of the said oil of vitriol, so then and there feloniously, &c. given and administered to him by the said *F. C.* as aforesaid, by means whereof the said *G. L.* then and there *became disordered in his mouth and throat*, and that the said *G. L.* by the oil of vitriol aforesaid, so by him taken as aforesaid, and by the *disorder, choking, suffocating, and strangling occasioned thereby* from, &c. until, &c. did languish, &c. and that afterwards the said *G. L.* of the said oil of vitriol and of *the disorder, choking, suffocating, and strangling occasioned thereby*, did die, &c.; and so the jurors say, that the said *F. C.*, him, the said *G. L.*, in manner and by the means aforesaid, feloniously, &c. did kill and murder, against the peace, &c." Second count, that *F. C.*, intending to kill and murder the said *G. L.* with a certain *acid* called oil of vitriol, did give and administer to, and force and compel the said *G. L.* to take into his mouth and throat a large quantity of the said acid called oil of vitriol; that the said *G. L.*, by the force and compulsion of the said *F. C.*, did take into his *mouth and throat* a large quantity of the said acid called oil of vitriol, by means whereof *G. L.* became *injured and disordered in his mouth and throat*, and incapable of swallowing his food, and that the child died *of the inflammation, injury, and disorder* occasioned thereby." To this indictment the prisoner pleaded *autrefois acquit*, and in her plea set out the former indictment, on which she had been tried and acquitted before *Burrough J.* at the *Devon* Summer assizes, 1818. That indictment alleged "that *F. C.*, wickedly contriving, &c. one *G. L.* with poison, feloniously, &c. to poison, kill, and murder, on, &c. at, &c. in and upon the said *G. L.*, a base born infant male child of tender age, to wit, &c. feloniously, &c. did make an assault,

and

and did then and there feloniously, &c. *give and administer* to the said *G. L.* a large quantity of a certain deadly poison, to wit, *oil of vitriol*, and did then and there feloniously, &c. force and compel the said *G. L.* to *take, drink, and swallow down* a large quantity of the said oil of vitriol, (she, the said *F. C.* then and there well knowing the said oil of vitriol to be deadly poison,) and that the said *G. L.*, afterwards, by the said force and compulsion of the said *F. C.* did *take, drink, and swallow down*, a large quantity of the said oil of vitriol, so then and there feloniously, &c. given and administered to him by the said *F. C.*, by means whereof the said *G. L.* then and there *became sick and distempered in his body*, and that the said *G. L.* by the poison aforesaid so by him *taken, drank, and swallowed down* as aforesaid, and of the sickness occasioned thereby, from, &c. until, &c. did languish, &c. on which, &c. at, &c. in, &c. the said *G. L.* of the poison aforesaid, and of the *sickness and distemper* occasioned thereby *did die*; and so the jurors say, that the said *F. C.*, him, the said *G. L.*, in manner and by means aforesaid, feloniously, &c. did poison, kill, and murder, against the peace, &c.

Demurrer and joinder in demurrer.

Schwyn, in support of the demurrer, having waived any objection to the form of the plea, on the ground that the Court would, in a case like the present, permit the prisoner to amend, if such objection should appear to be well-founded, addressed himself to the merits as follows. There is a material difference between the facts stated in the former indictment, on which the prisoner was acquitted, and those set forth in the present indictment; if so, the acquittal on the former prosecution is no bar to this. The nature of the plea of *autrefois acquit* is well explained by *Hawkins*: "The plea of *autrefois acquit* is grounded on this maxim, that a man shall not be

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brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all the books, as an undoubted consequence, that, where a man is once found not guilty on an indictment or appeal free from error and well commenced before any Court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever, plead such acquittal in bar of any subsequent indictment or appeal for the same crime" (a). The inference to be drawn from this passage, and from *Vandercomb* and *Abbott's* case (b), is this, that a former acquittal is no bar to a subsequent prosecution, unless the defendant might have been convicted on the first indictment by proof of the facts contained in the second. Now, here, the Defendant could not have been convicted on the first indictment by proof of the facts contained in the second; for the first indictment charges, that the prisoner compelled the child to drink and *swallow down* a large quantity of oil of vitriol, that the child did take, drink, and *swallow down* the said oil of vitriol, and that the child, by the poison so drank and swallowed down, and of the sickness occasioned thereby, did die. To sustain this indictment, it was essentially necessary to shew that the poison was *swallowed down* by the infant: merely to prove that the prisoner compelled the child to *take into it's mouth and throat* a quantity of oil of vitriol, that the child did take it in his mouth and throat, and that by the poison so taken, and by suffocation occasioned thereby, the child died, would not have sustained the former indictment. The modes of death are essentially different: the one indictment states a death by poison taken down into the stomach; the other states a death by suffocation.

(a) 4 *Hawk. c. 35. s. 1.* 7th edit. *Burglary, c. 15. s. 29.* 4th edit. *S. C. 2 Leach, 716.*

(b) 2 *East, P. C. 529. tit.*

Merewether, in support of the plea. The plea of *autrefois acquit* is not confined to cases only, where the second indictment is in the same form as the first, but extends to cases, where the offence charged is in truth and substance the same, *Rex v. Emden* (a); so, *1 Starkie* (b). Now, here, the same offence in substance is charged in both indictments, and a verdict of guilty, and judgment, might have passed on the first indictment, upon proof of the facts charged in the second. For, it is not necessary that every fact should be proved exactly as laid in the indictment. Thus, as to the weapon with which death is caused, it is said in *Maackalley's* case (c), that "if a man is indicted, that he, with a dagger, gave another a mortal wound, upon which he died; and in evidence it is proved that he gave the wound with a sword, rapier, staff (d), or bill; in that case the offender ought to be found guilty; for the substance of the matter is, that the party indicted has given him a mortal wound, whereof he died, and the circumstance of the manner of the weapon is not material." This, coupled with Lord Hale's opinion (e), and the case of *Rex v. Jackson and Others* (f) shews, that the kind of weapon, the means of death, the manner and place of the hurt, and the mode in which they operate, though precisely alleged, are not required to be precisely proved. And so, with regard to poisons, if one kind of poison is averred, evidence that a poison other than that averred has been administered will maintain the indictment (g). So, also, it is not

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(a) 9 East, 437.
(b) *Crim. Plead.* 304.
(c) 9 Rep. 67.

(d) *Baton*, in the French edition.

(e) 2 Hale, 186.

(f) *Howell's St. Tr.* vol. 18. p. 1075. *S. C. Hargr. St. Tr.* vol. 9.

(g) 2 Hale, 185. *Donellan's* case. *Weston's case.* 3 Inst. 135.

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necessary that time (*a*) or place (*b*) should be proved exactly as averred; nor the name (*c*) of the person injured, nor the person himself (*d*), nor the person injuring (*e*). So, if the second indictment be treated as a special verdict taken under the first, it would be sufficient for judgment to pass upon it, notwithstanding any variance immaterial to the essence of the offence (*f*). Thus, a variance as to circumstance hurts not the verdict (*g*). It is sufficient, if the verdict substantially find such facts as amount in law to the offence charged, though the precise and technical words of the indictment are not used (*h*). Now, the variances in the present case are three: first, in the description of the poison; and this makes no difference if the poison be in fact the same. In both the counts of the first indictment the poison is stated to be oil of vitriol: so it is in the first count of the second indictment. In the second count of the second indictment it is stated to be "a certain acid, called oil of vitriol." There can be no doubt that oil of vitriol (sulphuric acid) is poison. It is so classed, together with the other mineral acids, &c. by Dr. *Rees* (*i*). So, also, by Dr. *Male* (*k*); and its operation as a caustic makes no difference, for Lord *Coke* ranks amongst poisons *lapis causticus*, mercury sublimate, and arsenic (*l*). Also *aqua fortis* (*m*). These poisons would all operate like oil of vitriol, when taken into the

(*a*) *Rex v. Johnson*, 3 M. & S. 548. *Verba* Lord Ellenborough C. J. 2 Hale, 244. 2 Inst. 318. *Foster*, 9. 3 Inst. 230. 2 Hale, 179.

(*b*) 2 Hale, 245.

(*c*) 2 Hale, 181. 3 Dyer, 285. a.

(*d*) *Saunders & Archer's case*, *Plow.* 473.

(*e*) *Mackalley's case*, 9 Rep. 67.

(*f*) *Plow.* 101.

(*g*) *Mackalley's case*, 9 Rep. 67.

(*h*) *Rex v. Dawson*, Str. 19.

(*i*) *Encyclopedia*, vol. 28. tit. *Poison*.

(*k*) *Juridical Medicine*, 101.

(*l*) 3 Inst. 52.

(*m*) 3 Inst. 135.

stomach,

stomach, by their primary chemical action on that organ (a). The second variance is in the description of the manner, in which the poison was administered. In the first indictment the words are, "Take, drink, and swallow down;" in the second the words are, "Take into his mouth and throat." These are in effect the same; for a healthy subject cannot, as stated by Dr. Rees, avoid swallowing whatever has entered the fauces (b). But, "taking into the mouth and throat" would, at all events, when proved, have been sufficient to have supported the first indictment: for, it is not necessary to prove all three acts, viz. taking, drinking, and swallowing down; for the allegation is divisible, and proof of any one is sufficient (c); as is every day's practice in larceny: and Lord *Ellenborough*, in *Reg. v. Johnson* (d), (the indictment in that case was for stealing nine bank notes,) said, "If only one bank note of the value of 1*l.* had been proved, it would have been sufficient to support the charge." The third variance is in the mode in which the poison is stated to have operated. But the injury and disorder in the mouth and throat would have been evidence of the sickness and distemper of body charged in the first indictment; and the incapacity of swallowing food, choking, suffocating, and strangling, are all effects of the same cause, and proof of the same averment. And this is not necessary to be averred at all or proved. The manner and the means of death are only necessary to be alleged, as, by wound, or poison, and by what wound, and what poison; but not in what mode these causes operated or produced death: other-

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(a) *Rees's Encyclopadia*, tit. case. Str. 19. *Dawson's case*.
Poison, s. 3. "Mineral Poisons." 3 Inst. 49. *Weston's case*. 4

(b) *Ibid.* vol. 2. tit. *Deglutition*. Rep. 41. *Walker's case*.

(d) 3 M. & S. 548.

(c) *Bulstrode*, 87. *Morgan's*

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wise it must be shewn whether the wound produced immediate death by striking a vital part, by loss of blood, or by mortification: but this is never done, and, if permitted, would lead to endless subtleties. If it be said that the kind of death is different, and that choking, suffocating, and strangling, are different from poisoning, the doctrine will be admitted that a different kind of death, or cause of death, cannot be proved: but the kind of death is not different where death is produced by the same cause. Choking, suffocating, and strangling, might form different kinds of death, when produced by other causes, as choking and suffocating, where produced by direct and immediate force, acting mechanically on the throat. And so, strangling, the ordinary (a) and legal (b) acceptation of which is a death occasioned by external mechanical pressure on the throat. It is also to be observed, that the intention, as laid in the first indictment, is an intention to poison, kill, and murder; in the second indictment the word poison is omitted. This word, poison, is either material or immaterial; if it be material, (and poisoning is made felony by 1 Edw. 6. c. 12., and is said not to be within *Bracton's* definition of murder (c),) the second indictment is bad: if it be immaterial, then, notwithstanding the difference in this respect between the two indictments, the crime alleged in each is the same in substance; and those facts, therefore, which appear on the face of the second indictment, would have

(a) Στραγγαλῶν. *Strangulo, torqueo, stringo. Hederici Lexicon.*

(b) See *Tremaine*, 6. *Rex v. Green and Others*. Indictment for strangling Sir *Edmund Bury Godfrey* with a pocket-handkerchief. See, also, a legislative application of the word

in 4 Edw. 1. s. 2. which, directing of what things a coroner shall inquire, specifies "persons drowned, or strangled by the sign of a cord tied strait about the neck."

(c) *Kelynge*, 125. *Maw, gridge's case*.

supported the first, and might all have been given in evidence under it. If so, the prisoner has been once in jeopardy, and so is entitled to the judgment of the Court on this plea, and to be discharged.

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Selwyn, in reply, contended, that if the second indictment was ill, the former was ill also; and, if so, the prisoner had not been *legitimo modo acquietatus*. If in an indictment one thing may be laid and another roved, without restriction, all certainty would be at an end, and a door to the greatest latitude be opened. The death, here, was by suffocation by oil of vitriol; *non constat* that it was by poison. Poisons do not, necessarily, kill; they are become part of the *materia medica*; and a case might be supposed, of a child at the breast taking oil of vitriol into the stomach, in which case the milk would neutralize the vitriol, though the child might be suffocated by the oil remaining in the *fauces*. The act of compelling the child to "swallow down" the vitriol was the only charge in the first indictment, for the word "take" must be construed by its associates, — *noscitur a sociis*. The words, with which it is associated, are, "drink and swallow down;" and it must mean taken into the stomach, not into the mouth and throat. The substance of the charge is essentially different, and so the first acquittal is no bar to the second indictment.

No judgment was ever pronounced in this case; but the eleven Judges, who were present, unanimously overruled the demurrer, and

Allowed the prisoner's plea. (a)

(a) The Reporters are indebted to the kindness of one of their Lordships, who was present, for this information.

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February 3.

BERNEY v. VYNER.

The transfer of a trader's property, under circumstances similar to those stated in the case of *Berney v. Davison*, is no act of bankruptcy, notwithstanding a difference from that case in the following particulars: 1. no mention of the trader's personal property; 2. no statement that the trustees to the transfer were not creditors of the trader; 3. no mention of the trader's motive; 4. no mention of the abstract of the unexecuted deed furnished to the purchasers; 5. an additional statement, that on or about the time of the execution of the transfer, the trader was insolvent, and stopped payment.

THIS was a case sent by the Lord Chancellor for the opinion of this Court, by order, dated 18th November, 1819. The case differed from that of *Berney v. Davison* (a) in the following particulars; first, in making no mention whatever of *Boehm's* personal property; secondly, in omitting to state, that neither *Berney* nor *Thornton* were creditors of *Boehm*; thirdly, in omitting to assign *Boehm's* motive for executing the various deeds; fourthly, in omitting the mention of the abstract of the deed furnished to the purchasers, but never executed; and, fifthly, in stating, that at or about the time of the execution of the indentures of the 13th and 15th February, 1819, *Boehm* and *Taylor* were insolvent, and either previously to or shortly after the execution thereof, stopped payment, and declined, and were then unable to pay their just debts.

The question for the opinion of the Court was, "Whether by reason of all or any of the matters and things before stated, the said *Edmund Boehm* hath committed an act of bankruptcy? And if so, what such act of bankruptcy is, and when the same was so committed?"

Lens Serjt., for the Plaintiff, contended, that the omission of these allegations made no difference in the case, as no fraud was imputed, nor, any design to put the property in a train of distribution different from that pointed out by the spirit of the bankrupt law.

Bosanquet Serjt., contra, in addition to the arguments employed by him in the case of *Berney v. Davison*, urged, that the omission of any statement as to the possession

(a) *Ante*, 408.

of

of personal property to so large an amount as 27,000*l.* *ultra* the real property, made a material difference; as, for aught that appeared by the present case, the *whole* of the party's property might have been placed out of his control, which would clearly be an act of bankruptcy. It was a strong circumstance, here, that the stopping payment, insolvency, and execution of the deed, all happened on the same day; and this, being coupled with an omission to assign the motives, formerly stated for the conveyance, it must be intended that they did not exist; and that the transaction, however well meant by the party, must be deemed fraudulent within the spirit of the bankrupt laws. It had, indeed, obviously the effect of delaying the old creditors, by providing, first for the future creditors, who might advance money or bills; and, by putting it out of the power of the old creditors to execute any judgments which they might have obtained; for, where the real estates, which might have been taken by *elegit*, and the chattels, which might have been taken by a *fi. fa.*, were all reduced to money, and that money was in the hands of the trustees, how was a judgment-creditor to touch it? The same argument was applicable to any of the produce of those estates, that the trustees might invest in the public funds.

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Lens, in reply, observed, that it could not be contended that any fraud or improper motive was imputed by the present statement of the case; for, if that had been so, the question would have been submitted to a jury.

Cur. adv. vult.

The following certificate was afterwards sent :

“ THIS case has been argued before us by counsel; we have considered it, and are of opinion, that the said *Edmund Boehm* hath not, by reason of all or any of the

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the matters and things stated in the case, committed any act of bankruptcy.

R. DALLAS.

J. A. PARK.

J. BURROUGH.

J. RICHARDSON.

Feb. 19. 1820.

February 3.

J. D. MEREST and EUNICE ANNA, his Wife,

v. JAMES.

Devise of certain freehold and copyhold lands and messuages at *H. W.* and *S.* to trustees to the use of devisor's daughter, *E. A. P.*, for life, and, after her decease, then to the use of the issue of her body lawfully begotten; and, in default of issue, or in case none of such issue lived to attain the age of 21 years, then (as to the lands at *H.*) over to devisor's brother, *S.*, for life, and, after his decease, then to the use of the issue of his body; and, in default of issue, or in case none of such issue lived to attain the age of 21 years, then to devisor's brother *H.* for life, and after his decease, then to the issue of his body lawfully begotten; and, in default of issue, then to devisor's sister *E.*, her heirs and assigns for ever. And, as to the lands at *W.*, upon the death of *E. A. P.* without issue, or, if issue, they should not live to attain the age of 21 years as aforesaid, to his brother *H.*, his heirs and assigns; and, after the death of *E. A. P.*, without issue as aforesaid, all the messuage at *S.* to his sister *E.*, her heirs and assigns: Held, that *E. A. P.* took an estate for life in the premises.

THIS was a case transmitted by the Master of the Rolls for the opinion of the Judges of the Court, and turned upon the following limitation, in the will of *John Pearson*, of certain freehold and copyhold lands and messuages at *H.*, *W.* and *S.* devised by him to trustees, as follows, viz. as to the whole, "to the use of my daughter *Eunice Anna Pearson* for and during her natural life, and from and immediately after her decease, then to the use of the issue of her body lawfully begotten, and in default of issue, or in case none of such issue live to attain the age of twenty-one years, then, I give and devise the lands at *H.* to my brother *S.* for and during his natural life, and from and immediately after his decease, then to the use of the issue of his body; and in default of issue, or in case none of such issue live to

attain

attain the age of twenty-one years, then to my brother *H.* for and during the term of his natural life, and from and immediately after his decease, then to the issue of his body lawfully begotten, and in default of issue, then to my sister *E.*, her heirs and assigns for ever." Then he devised as follows, as to the lands at *W.*, "upon the death of my daughter *Eunice* without issue, or if issue, they shall not live to attain the age of twenty-one years, as aforesaid, to my brother *H.*, his heirs and assigns." And as to the messuage at *S.* "after the death of *Eunice* without issue as aforesaid, to my sister *E.*, her heirs and assigns." The Plaintiffs had, in *October*, 1818, entered into a written contract with the Defendant, for the sale of certain of the lands, &c. devised as above; but the Defendant objecting to the title of the Plaintiffs, a bill was filed by them for a specific performance. The question for the opinion of the Court was, "What estate did the plaintiff *Eunice Anna*, the wife of the said Plaintiff *J. D. Merest*, take in the freehold and copyhold tenements contracted to be purchased by the Defendant, under the wills of *Samuel Pearson*, her grandfather*, and *John Pearson* her father, in the pleadings respectively named?"

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Lens Serjt., for the Plaintiff. *Eunice* takes an estate tail under the terms of this will. If the devise over to *Henry Pearson* had immediately followed the words *without issue*, there could have been no doubt, as the case would have fallen immediately within the authority of *King v. Milling (a)*. But, notwithstanding the insertion of the words "or if issue, they shall not live to attain the age of twenty-one years," before the devise over, effect cannot be given to this will without such a

(a) 1 *Vent.* 215. 225. *S.C.*
 2 *Lev.* 58.

* The will of the grandfather

was set out in the case, but nothing turned on it, nor was it referred to in the argument.

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construction as shall give *Eunice* an estate tail. It must be admitted, that the deviser contemplated the giving her an estate for life only; but he also intended that the whole of *Eunice's* issue should be provided for, or extinct, before the property went over to a stranger; this was clearly his paramount and general intention, though his particular intention might have been to give *Eunice* only an estate for life. But from *Roe, dem. Dodson, v. Grew* (a), down to *Doe, dem. Cock, v. Cooper* (b), it has been uniformly laid down, that, where a particular intention of the deviser is inconsistent with his general intention, and both cannot be carried into effect, the particular shall be sacrificed to the general intention. In the present case, unless *Eunice* take an estate tail, the testator's general and paramount intention (to provide for all of his own descendants, before his property should go over to strangers or collaterals,) may be entirely defeated; for, if a child of *Eunice* should marry and have issue while a minor, and die before attaining the age of twenty-one, leaving issue, the estate would pass to strangers, and that issue would be left destitute. But even if such issue should survive the age of twenty-one, the limitation to them, containing no words of inheritance, they would only take estates for life, and on their death, the property would go over, leaving their descendants unprovided for: in order, therefore, to provide for the right line before the collaterals, which was the testator's clear intention, *Eunice* must take an estate tail. There is no case precisely in point; for *Doe, dem. Davy, v. Burnshall* (c), is distinguishable on several grounds, but chiefly, that, there, the inheritance was conveyed, and the children would take the fee; while here, there is not even the word *estate*, to carry an inheritance. There, the

(a) 2 Wils. 322.

(b) 1 East, 229.

(c) 6 T.R. 30.

testator mentions the children *eo nomine*, as children, and makes the devise over, in default of *such* issue, meaning those very children; here the devise over is, generally, in default of issue. There, the children and all their descendants were provided for, before the estate could go over to strangers; for the devise over was to operate only on death under twenty-one *without* leaving issue. In that case, therefore, it was rightly decided, that the devisee had but an estate for life, there being no necessity for giving her a longer estate.

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Hullock Serjt., contra. *Eunice* takes an estate for life, with a contingent remainder in fee to her children, as joint-tenants, determinable by executory devise, in case no child should attain twenty-one years. The children would take a fee by implication, because, if only a life-estate had been intended for them, it is immaterial whether they attain the age of twenty-one or no. *Frogmorton, dem. Bramstone, v. Holyday (a), Doe, dem. Wight, v. Cundall (b).* This disposes of the objection, that no inheritance is limited to the children; and, when a second child is born, the estate, vested in the first, opens to admit the devise in joint-tenancy to the second, *Oates, dem. Hatterley, v. Jackson (c).* Then, with respect to *Eunice*, the clear intention of the deviser was, that she should not have power to defraud her children by cutting off the entail, and which she would have been enabled to do, unless restrained by an estate for life; and there was no mode, save such restraint, of securing the children. The rule, as to sacrificing the deviser's particular intention, in order to carry his general intention into effect, only applies to cases, where the particular intention cannot be executed, if the general intention takes effect.

(a) 3 Burr. 1624.

(c) Str. 1172.

(b) 9 East, 409.

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In *Doe v. Cooper (a)*, Lord *Ellenborough* founds his decision expressly on an inability to effect the deviser's intention. *Roe, dem. Dodson, v. Grew* went on the same principle, and the decision turned on grounds totally different from the case here. There, the children were tenants in common; here, they would be joint-tenants. The same difference exists in *Doe, dem. Candler, v. Smith (b)*: but, here, the testator's particular intention may be carried into effect consistently with his general intention; and his general intention of carrying the estate over to the issue of *Eunice* will be entirely defeated by giving her an estate tail. *Doe, dem. Davy, v. Burnsall* is decisive of the present case, the reasoning, there, being precisely in point. A case on the same will came before this Court in *Burnsall v. Davy (c)*: the former case is recognised by Gibbs C. J. in *Crump, dem. Woolley, v. Norwood (d)*; and the principle contained in it is confirmed by *Toovey v. Basset. (e)*

Lens Serjt., in reply. It has not been shewn that *Doe, dem. Davy, v. Burnsall*, is in point; the doctrine of *Frogmorton v. Halliday* cannot be laid down as a general principle, and the case is easily distinguishable from the present; for the estate was there given to the son by name, and devised over immediately on his dying under twenty-one; here, it is not confined to the first devisee, but extended to her issue. Nothing has been said as to the general doctrine on the subject of this devise; nor has any argument been opposed to the numerous authorities in which it is laid down (*f*). The argument drawn from the possibility of *Eunice's* de-

(a) 1 *East*. 229.(b) 7 *T.R.* 531.(c) 1 *B. & P.* 215.(d) 7 *Taunt.* 362. 2 *Marsh.* 361.(e) 10 *East*, 460.(f) See 6 *Cruise. Dig.* 305. 377.

stroying the estate tail, if it vested in her, and excluding her children from the inheritance, is wholly inapplicable; because, the law does not look to the destruction but the continuance of estates: and, if an estate be conferred which, by its continuance, would effect the deviser's purposes, his intentions are sufficiently satisfied; as it is to be presumed, that where a possibility of effecting them is afforded, they will of course be duly observed.

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Cur. adv. vult.

The following certificate was afterwards sent.

“ This case has been argued before us by counsel, we have considered it, and are of opinion, that, by the will of *John Pearson*, the father of the Plaintiff *Eunice Anna*, the legal estate in the freehold and copyhold tenements, contracted to be purchased by the Defendant, is vested in the devisees in trust therein named; and that, subject to the trusts thereby created, the said *Eunice Anna* took the beneficial interest in the said freehold and copyhold premises, for her life only, under the will of the said *John Pearson*, her father; and that she took no estate or interest therein under the will of *Samuel Pearson* her grandfather.”

R. DALLAS.
 J. A. PARK.
 J. BURROUGH.
 J. RICHARDSON.

Feb. 18, 1820.

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February 4.

HOWELL and Wife, Executrix, v. WYKE.

The Court refused, on motion, to assimilate the practice of the Court of C. B. to that of the Court of K. B. in proceedings against bail.

THE Plaintiffs had obtained, against the Defendant, in an action of debt on bond, a judgment for 1073*l.*, and (the Defendant having absconded,) now sued his bail by *scire facias* on their recognisance. The debt sworn to on the Defendant's arrest was 800*l.*, the Plaintiff, at that time, not knowing exactly what was due on the bond.

Pell Serjt., on a former day, had obtained a rule *nisi* to stay all further proceedings on the *scire facias* against the bail, on payment of the sum of 800*l.* to the Plaintiffs, or their attorney, together with the costs of the cause of *Howell v. Wyke*, and the costs occasioned by the proceedings against the bail on their recognisance, the same to be taxed by one of the prothonotaries. He moved for the rule with a view to obtain an assimilation in the practice of this Court, and that of the King's Bench. The bail, by bill in the King's Bench, giving a general recognisance, that, if the Defendant be condemned he shall satisfy the costs and condemnation-money, or render himself to the custody of the marshal; or, that the bail will pay the costs and condemnation-money for him, (and upon this recognisance it has been customary to charge the bail with no more than the sum sworn to and costs): whereas, in the Common Pleas the bail enter into a recognisance in double the sum sworn to (a), and are liable to pay the amount recovered against their principal, together with costs.

(a) R. G. 36. G. 3. C. P. 1 B. & P. 530.

Cross Serjt. now shewed cause against the rule, and cited *Dahl v. Johnson* (a) as establishing the practice of this Court, which had been laid down on consideration, and had subsisted for more than twenty years, although in that case *Buller J.* seemed to consider the practice of the Court of K. B. as preferable. But the practice of this Court was exceedingly useful in cases like the present, where an executor could not swear to the precise amount due.

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Per Curiam. In consequence of what has now been urged, we may, perhaps, be induced to consider the propriety of laying down a new rule on these matters; but the practice having prevailed here so long, we cannot in justice alter it without notice. The rule must be discharged, but without costs.

Rule discharged.

(a) 1 B. & P. 205.

CHARLES AUGUST WETTER and WETTER GIRTANNER v. SIGISMUND RUCKER and JOHN DIEDRICH RUCKER. February 5.

THIS was an action of *assumpsit*, brought to recover the sum of 481*l.* 18*s.* 6*d.*, due from the Defendants to the Plaintiffs. The declaration contained counts for goods sold and delivered, and the usual money counts. Money obtained of garnishee, under a foreign attachment, is not (unless execution be executed,) a compulsory payment, so as to effect a discharge of a debt due from garnishee to the Defendant-in-the-Lord-Mayor's-Court.

Semble, that entering a sum to the credit of a party in a merchant's books is not payment, unless under an express assent, that such entry shall stand for payment,

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At the trial of the cause before *Dallas C. J.*, at the *London* sittings after *Trinity* term, 1819, a verdict was found for the Plaintiffs for the sum of 480*l.*, subject to the opinion of the Court upon a case, which stated in substance as follows :

The Plaintiffs are foreign merchants residing in *Switzerland*, and the Defendants are merchants in *London*. The Plaintiffs and Defendants had considerable dealings previous to the 1st *January*, 1815, at which time, there was due from the Defendants to the Plaintiffs the sum of 481*l.* 18*s.* 6*d.*, claimed in the action above mentioned. The Plaintiffs, also, had considerable dealings with *Francis Taders Reyer*, *Joseph Schlik*, and *Nicholas Strohlendorf*, trading at *Trieste*, in *Italy*, under the firm of *Reyer and Schlik*, and were indebted to the said *F. T. R.*, *J. S.*, and *N. S.*, in a sum exceeding the amount of the debt due from the Defendants to the Plaintiffs. On the 29th *April*, 1815, *F. T. R.*, *J. S.*, and *N. S.*, commenced an action, in the Mayor's court of *London*, against the Plaintiffs in the present action; and, the Plaintiffs not appearing to the action in the Mayor's court, *F. T. R.*, *J. S.*, and *N. S.*, on the 29th *April*, above mentioned, according to the custom of *London*, attached in the hands of the Defendants the sum of 500*l.* as the proper monies of the Plaintiffs. The Defendants in the present action (being the *garnishees* in the attachment) pleaded to the attachment, on the 15th *June*, 1815, that they, the said *garnishees*, had not owed to or detained from, or then owed to or detained from, the Defendants in the said action in the Mayor's Court (the Plaintiffs in the present action), the sum of 500*l.*, or any part thereof. On the 24th *November*, 1815, the attachment was tried before the Recorder of *London*, and a verdict recovered against the said *garnishees* for 480*l.* On the 29th *November*, judgment was obtained in the Mayor's Court, founded on such verdict; and, on the
1st De-

1st *December*, the usual certificate, according to the practice of the *Mayor's Court*, was granted by the proper officer of the Court, that such judgment had been obtained. On the 5th *December*, 1815, upon the production of the certificate by the Plaintiffs in the action in the *Mayor's Court* to the *garnishees*, the *garnishees* paid the Plaintiffs in the last-mentioned action the amount of the verdict, by debiting the Plaintiffs in the present action in their (the Defendant's) books of account with the said sum of 480*l.*, and crediting *Reyer* and *Schlik* therewith. The entries in the Defendant's books showing the manner of the transfer, were thus made:

Cas.	Messrs. <i>Reyer & Schlik</i> in account with <i>Rucker Brothers</i> .	Das.
1815.		£
Dec. 5.	Credit them to <i>Wetter Brothers'</i> account, page 41. ...	480
Cas.	Messrs. <i>Wetter Brothers</i> in account with <i>Rucker Brothers</i> .	Das.
1815.		£
Dec. 5.	By balance £480. Dec. 5. <i>Reyer & Schlik</i> , by order } of the Lord Mayor's Court }	480

Being the amount of the debt due to them from the Plaintiffs, under an engagement that it should be returned if the proceeding failed; and without any execution having issued against them (the Defendants in the present action), except the certificate stated in the appendix to the case. The case further stated, that it is the business of the attorney for the Plaintiff to enter satisfaction on the record; but there are not any means of compelling him to do so, which can be resorted to by the *garnishees* or the Defendants. And that on the 20th *February*, 1816, the Plaintiffs in this action appeared to the original action against them in the *Mayor's Court*, and put in bail; by which proceeding, according to the custom of the city of *London*, the attachment was dissolved. The case then stated the records, or entries as of record, in the *Mayor's Court*, relating to the action between *Reyer* and *Schlik*, Plaintiffs, and

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Wetter and Co. (the present Plaintiffs), Defendants, *S. Rucker* and *J. D. Rucker* (the present Defendants), being *garnishees*. The record ended thus, "Therefore it is considered by the Court, that the aforesaid Plaintiffs have execution of the said 480*l.* in monies numbered, so found by the jury as aforesaid by pledges, &c., if the Defendants, &c., and process for the remainder, &c.

"Pledges for the within named Plaintiffs to restore, &c., if the Defendants, &c., that is to say,

"*J. A. Rucker, Mincing Lane, Merchant,*
John Rapp, Merchant, 25, Budge Row."

"The question for the opinion of the Court was, Whether, under the circumstances above stated, the Plaintiffs are entitled to recover from the Defendants the said sum of 480*l.*? If the Court shall be of opinion that the Plaintiffs are so entitled, the verdict is to stand for that sum; if the Court shall be of opinion that the Plaintiffs are not entitled, a nonsuit is to be entered."

* * The following certificate of the judgment in the Mayor's Court was subjoined to the case, in the shape of an appendix :

Messrs. *Sigismund Rucker,* }
 and *John Diedrich Rucker.* }

"I do hereby certify, that judgment hath been entered against you in the *Lord Mayor's Court, London,* at the suit of *Francis Tadens Reyer, Joseph Schlik,* and *Nicholas Strohlendorf,* trading under the firm of *Reyer and Schlik,* Plaintiffs, for the sum of four hundred and eighty pounds, heretofore attached in your hands, as the proper monies of *Charles August Wetter* and *Wetter Girtanner,* trading under the firm of *Brothers Wetter,*
 Defend-

Defendants; and that security hath been given by the Plaintiff in the said attachment, for the restitution of the said monies, if their debt shall be disproved, according to the custom, as by the record of the said judgment now remaining in the said Court appears. Dated the 1st December, 1815.


“ *William Jones*, Plaintiffs’ Attorney.”

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Taddy Serjt. (with whom was *Vaughan Serjt.*) for the plaintiffs. In order that the discharge claimed by the defendant, by virtue of the judgment in the foreign attachment, may furnish him with any valid defence, to this action, it must appear first, that the sum awarded by the judgment in foreign attachment to *Reyer and Co.* was paid; and secondly, that it was paid compulsorily. Now the money was never, in fact, paid. The Defendants, *Rucker and Co.*, did no more than make an entry in their own books, by which they transferred to the credit of *Reyer and Co.* a sum due from the *Ruckers* to *Wetter and Co.* the Plaintiffs. And this too, under an indemnity, that *Reyer and Co.* would repay the sum to be received from the *Ruckers*, in case *Wetter and Co.* should disprove the debt claimed by *Reyer and Co.* This, therefore, was no payment, but a memorandum privately made by the defendant in his own books, and operating as a notice to none but himself. Besides which, the nature of a foreign attachment is rather that of a process to compel appearance, than a means of recovering a debt. It is, indeed, sometimes applied for the latter purpose, but that is only a collateral object, for whenever the defendant appears the attachment is dissolved. The *Ruckers*, therefore, have still less reason to call this transaction a payment, as *Wetter and Co.* did appear to the attachment, which was, in consequence, duly dissolved. But, if it be admitted, that the transaction in question amounted to a payment, still it cannot

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be called a compulsory payment. It is part of the custom of foreign attachment that it should appear on record, that the plaintiff has had execution and satisfaction; and the reason of this is, that it is a proceeding against an absent person, and he should have means on record, of proving, that the debt claimed against him has been paid. The entry in the *garnishees'* book is too uncertain and too liable to destruction, to afford him any adequate security. That, under the custom of foreign attachment, execution and entry of satisfaction on the record are necessary to effect a discharge of the debts, is clearly shown in the following authorities. 22 Ed. 4. 30. b.—1 *Wms's. Saund.* 67. a. *Turbill's case*.—*Dyer*, 82. b.—1 *Roll. Abr.* 555. L.—*Co. Ent.* 139. b.—*Vidian*, 25.—3 *Wentw.* 249.—*Bohun Priv. Lond.* 288. 296.—*Com. Dig. Attach. E.*—3 *Wils.* 297. *Fisher v. Lane*.—2 *H. B.* 364. *Morris v. Ludlam*.

Boanquet Serjt. (with whom was *Lens* Serjt.) for the defendants. It is admitted, that in order to effect a discharge of this debt, there must be a payment, and that payment must be compulsory. And first, there has been a payment here. A payment in account is the same thing as a payment in monies numbered, and the entry in the *Ruckers'* book, operates as a discharge to *Wetter* and Co.; for *Reyer* and Co. have accepted this book-transfer in satisfaction, and can never again call on *Wetter* and Co. But, it is urged, that there is an engagement between *Reyer* and Co. and the *Ruckers*, that if the proceeding fails, the money shall be repaid by *Reyer* and Co.: and, it is said, the proceeding has failed, because *Wetter* and Co. have appeared. But the proceeding does not fail, unless *Wetter* and Co., in addition to making an appearance, disprove the debt claimed by *Reyer* and Co. The payment too was compulsory. When a judgment has been obtained against the

the *garnishee*, execution may issue immediately; and, the judgment here, is, that the plaintiff in the attachment do have execution against the *garnishee* in monies numbered. Of this judgment the Defendants receive notice by the certificate sent to them. Upon this they incur a legal liability; if they do not obey, they may be arrested and imprisoned, and the payment being made under such legal liability must be deemed compulsory. If actual execution were necessary to the discharge of the debt, a payment upon the service of the writ of execution would be insufficient, and the party must go to prison though never so willing and able to pay.

As to the necessity of entering satisfaction on record, that is a circumstance entirely out of the defendant's controul; for the original debtor is entitled to come in at any time within a year and a day and disprove the debt; but this he could not do if satisfaction were entered up (a). None of the books on the privileges of *London* say, that execution is necessary to the discharge of the debt. The case in *Dyer* only decides, that the party shall not be deemed satisfied, unless the fruit of the judgment be obtained; not that execution shall necessarily be sued out. The entries are only authorities to show, that the party may plead as the form is there, when there has been an execution. The return of *Sterkey* recorder in 22 *Ed. 4.* (b) shows, that a return of *nihil* is sufficient; and *M^cDaniel v. Hughes* (c), that all the proceedings may be given in evidence.

Taddy in reply. The entry of satisfaction may be made immediately, subject to be set aside if the debt be afterwards disproved. There is no authority, which enjoins the party to wait a year and a day before entering

(a) *Bobun. Priv. Lond.* 194.

(b) 30 b.

(c) 3 *East.* 367.

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it up. It may be admitted to be a hardship, that the *garnishee* should not be permitted to enter up satisfaction on payment, and that he should be compelled to submit to actual execution; but it would be a much greater hardship, if a transfer could be made of the debt of a foreign merchant behind his back, without his having any certain means to establish the fact of his creditor having been paid by the claim he himself has so lost. In no case has a mere transfer on account been held to amount to payment, except where it has been made with the knowledge and consent of all the parties concerned, and under an understanding, that it should stand for payment. *Buller v. Harrison (a)*.

DALLAS C. J. Whatever may be the final decision of the Court in point of law, one thing, at least, is perfectly clear, and that is, that this is a proceeding which ought to be strictly watched, and a custom, which, from its very nature, in order to protect the party, must be strictly pursued. The facts of the case are these, — *Wetter* and Co., being foreign merchants, had a sum of money belonging to them in the hands of *Rucker* and Co. *Rucker* and Co. were also correspondents with *Reyer* and Co.; and *Reyer* and Co., who were (as well as *Wetter* and Co.) foreign merchants, claiming a sum of money of *Wetter* and Co., attached that sum, which belonged to *Wetter* and Co., in the hands of *Rucker* and Co., and which sum, *Rucker* and Co. admitted to have been in their hands as belonging to *Wetter* and Co.: and it is perfectly clear, to go by steps, that *Rucker* and Co. had no right to examine, whether the debt claimed by *Reyer* and Co. was a debt, or a claim unjustly founded; or, if it were a debt, they had no right whatever voluntarily to pay *Reyer* and Co., with the money of *Wetter* and

(a) *Cowp.* 565.

Co., which was in their hands. It is, therefore, agreed upon both sides, that, in order to protect themselves by a payment, which they had no express authority to make, or any implied authority from the party to make, they must show, that it was a payment by compulsion, — by compulsion in the strictest sense of the word; and it cannot be a compulsion of such a description, unless the custom, under which they seek to protect themselves, has been strictly pursued.

With respect to the justice of the case, the facts appear to be these; and one would naturally suppose, that, in the first instance, *Wetter* and Co., being foreign merchants, ignorant of the law of this country, and not residing within its jurisdiction, (except as represented by their effects in that jurisdiction) ought, in justice, to have had notice of this claim from *Rucker* and Co. before these proceedings were suffered to go on from time to time, and for a considerable time, behind their backs; but the case states nothing of that sort, and, therefore, though they might have received notice, we must conclude that they did not; because, if such notice had been given, it would have been very important that such a fact should have been shown.

This is, therefore, a proceeding, in which a party might have had notice, but has not had notice; and, in which, behind his back, he is to be held concluded by a payment, he being perfectly ignorant of any such payment having been made. Now, in this case, it is agreed, as I stated before, that, in order to protect *Rucker* and Co., the payment must have been a payment by compulsion; and, beyond that, it involves this question, namely, whether the compulsion was created by the custom, — which it could only be, by the custom being strictly pursued.

First, then, was it a payment in point of fact? *Rucker* and Co. having dealings with *Reyer* and Co., instead of actually

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actually parting with the money in their hands, and paying it over, merely transfer it in account; I will not examine whether, in every case, a mere transfer of money in account, in which one party, being bound to pay a certain sum, says, I give you credit for that sum, and the other party having notice says, I assent to it, forms a payment? This is not that case, for, it appears, I think, that *Rucker* and Co. were not bound to pay, and it was a payment by a mere transfer in account, the party transferring having no directions whatever to make that transfer. But, in this case, beyond that, it appears to me, that there was no payment whatever; for *Rucker* and Co. have not parted with this sum absolutely, even by a transfer in account; they have only transferred it over, under an indemnity, that is, they have received an engagement from *Reyer* and Co., that they, *Reyer* and Co., will return the money, if, by putting in bail, *Wetter* and Co. shall ultimately dissolve the attachment. *Wetter* and Co. have put in bail and dissolved the attachment; then *Reyer* and Co. are bound to repay this money to *Rucker* and Co., and it is still money remaining in the hands of *Rucker* and Co. and not in the hands of *Reyer* and Co.; and, therefore, if the case stopped here, I should say, that, even if the sum, instead of being transferred in account, had been actually paid, yet, inasmuch as the payment would have been voluntary, and, moreover, a payment under an engagement, that the money should be repaid if the proceeding failed, such an act would have been no payment whatever.

But, further, the question whether this be a compulsory payment, must depend upon the enquiry whether the custom has been pursued.

What is the custom? That the plaintiff shall have judgment against the *garnishee* and that he shall be quit of the other, not on judgment, but after execution issued. But, it is said, is the party against whom there has been a judgment

ment to wait for the execution to issue? Is there not a hardship in this, if he is willing to pay immediately, and, is not the legal liability to pay, equivalent to a payment under actual execution? I will not examine whether it be so or not, because, I am penned in by the custom itself. If the custom be not merely, that judgment shall issue, but that the payment shall be made after execution issued, then you must pursue the custom strictly. The custom requires, that execution shall issue, and, if it be a hardship, it is a hardship growing out of the custom, and only proves the custom to be hard; but, inasmuch as the party must pursue the custom, the enquiry always comes round to the same point, namely, what is the custom? — and the custom is, that the payment must be after execution.

Upon both grounds then, first, because I think that this is not a compulsory, but a voluntary payment; next, that it is not a parting with the money belonging to *Wetter* and Co., because the money, is still money in the hands of *Rucker* and Co., I think that the plaintiff is entitled to judgment.

PARK J. I should not add a word upon this, after his lordship has so fully entered into the whole of the argument, were it not to say, that, in coming to the same conclusion, I wish to be considered as having done so on the same grounds, and not upon the ground pressed upon us from the bar, of the necessity of entry of satisfaction upon the record. I do not think it is necessary to enter into that; but, of this I am quite clear, that, upon the custom, in every point of view, it is necessary, not only that the judgment should be that execution shall issue, but that an actual award of execution should be made. It is impossible to say, upon the statement of the case, that there has been a payment. It is impossible to call that a compulsory payment, which is paid out of
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my pocket, into the pocket of another party, that party undertaking to return the money in case a proceeding should fail. The case of *Buller v. Harrison* has, I believe, been acted upon invariably ever since it occurred. If *Rucker* and Co. had intended to part with this money; if there had been a payment made, or a rest in the account, as that case states; such facts would show the *bona fides* of the transaction, and, a transfer in the books, might, under those circumstances, be a payment: but, I repeat, it appears impossible to say, that, when a man stipulates to have his money back again if a proceeding should fail, there has been a payment. Then the question is, whether there has been a compulsory payment? It cannot be sufficient, that there shall be a notice by the attorney, not accompanied by certificate of the officer of the court; a judgment is obtained against the Plaintiffs, five days after that event; they being in *Switzerland*, might have been advised of the proceedings, and might have sent to put in bail; but this proceeding begins in the month of *April*, 1815, the money is paid in *December*, 1815, and it does not appear, that Messrs. *Wetter* ever heard one word on the subject. Under these circumstances, I think the justice of the case goes with the law.

BURROUGH J. I think there is no colour for calling this a payment; for no man can dispose of another person's money, without his consent, and, I am of opinion, that this is not a *bona fide* payment of the money. It turned on a certain condition, and the whole manner and shape of the transaction appears to me to want *bona fides*. If this payment can be supported, it must be supported on a custom which, we know, is against the common law; it obtains in *London*, *Bristol*, and *Exeter*, and in no other places. We know that all the customs of *London* have been confirmed by act of parliament; and

and a great number of these customs could not be sustained but for the act of parliament. This is a custom of a very extraordinary kind; and, therefore, must be watched and strictly adhered to. It is a custom to dispose of the property of men without their knowledge, and, therefore, we ought to see, that it has been correctly pursued. Now, we are bound by the report of the custom as certified by the *Recorder*; we cannot stir out of that, it is the same as an act of parliament to us. It was originally certified by *Sterkey* the *Recorder*, in the 22 *Edward 4.* (a); and that certificate is stated in the year-book, to be that the Plaintiff shall have judgment against him, and that the *garnishee* shall be quit against the other, after execution sued by the Plaintiff. I can see much reason for the custom being so; because, where execution has actually issued, there can be no collusion or management at all, but the whole effect of the payment is had. The money is then paid to the creditor, and the custom, as it is expressed, is, "that he shall be quit of the other after execution sued by the Plaintiff." Now, looking at this record, we see, that execution never has been sued; but the attempt is to make out a payment in the same manner as if the execution had been sued. The custom must be strictly pursued, in order to make this a payment. Under these circumstances I agree entirely with my lord and my brother *Park*, that, as the custom has not been pursued, this is not a payment.

RICHARDSON J. — I agree with the Court on both points: First, I think that this is not an actual payment. It is argued, that a transfer in account is equivalent to an actual payment of the money; I apprehend it must be such a payment as discharges the party paying, and binds the party receiving: but this is only a con-

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ditional payment, that, if the proceeding fails, it shall go for nothing. The proceeding does fail, I apprehend, by the filing of the bail within the year and a day, and the attachment is dissolved. My brother *Bosanquet* argued, that the failing of the proceeding means a disproof, on putting in bail, of the existence of the debt. In my opinion such is not the meaning; but, the putting in bail and dissolving the attachment, and I think that the payment goes for nothing. I think it unnecessary, therefore, to consider how far in certain cases a payment may be made in account:—undoubtedly it may be so made, if all the parties concur in the payment, or in certain circumstances, where the party acting upon it has taken measures; but the money still continues in the hands of the Defendants, they will pay it to the Plaintiffs, and they will be discharged of that transfer in account, as against *Reyer* and Co.

Secondly, I also think this is not a payment by compulsion within the meaning of the custom. There are many cases, in which payment by a man may be considered as compulsory, even without process of law issued against him, where the payment is made under a legal liability; but, here it is part of the custom, that there shall be not only an award but an actual execution issued. That appears to be the custom, as far back as it is traced in the year-books; and it is certified by *Sterkey*, that the party shall be discharged on execution issued. That, I apprehend, means execution executed, and the reason appears to me to be strongly in favour of considering that as part of the custom, namely, because it will appear upon the record, that there has been payment obtained from the *garnishee*, by virtue of which, and by the record, the original Defendant may be able to defend himself against any future demand on the part of the Plaintiff. Undoubtedly it appears from the authority cited from *Dyer*, that the mere judgment of the *Mayer's court* is no bar at all to the original creditor

ditor proceeding, as he might have done, against his original debtor, and obliging him to pay; there must be something more than a judgment: What more, then, is necessary? An execution executed, and I think the custom requires that, in order to render the payment compulsory, and to discharge the *garnishee*; otherwise the original Defendant would be placed in this difficulty, that, being sued, he would have no means of proving that any thing had been done, but the original entry of judgment; and, perhaps, his only means of obtaining further knowledge would be, by a reference to the books of the *garnishee*, to which he might or might not have the means of access. I think, therefore, that, in this case, judgment ought to be for the Plaintiff.

Judgment for the Plaintiff accordingly.

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SELBY v. CRUCHLEY.

Feb. 9.

PELL Serjt. showed cause against a rule *nisi* obtained by *Lens Serjt.*, calling on the Defendant in *replevin*, on distress for rent, to give security for costs, on the ground of his residing abroad out of the jurisdiction of the Court, he having, on application made to him, refused to give such security.

A defendant in *replevin* residing out of the jurisdiction of the court is liable to give security for costs.

The rule was resisted, on the ground, that the application to the Court was of the first impression, no such application having ever been made in the case of a Defendant; and that though a Defendant in *replevin* might, in some respects, be considered a Plaintiff, yet he was usually, as in this case, a landlord, whom the Court

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would not impede in the exercise of the summary remedy which the law has given him for the recovery of rent. The rule had already been extended from foreigners to natives, and some line must be drawn.

Lens Serjt., in support of his rule, urged, that the Defendant in *replevin*, being in reality an actor, commencing his proceedings by making distress, and being, substantially, the party most interested in pushing the cause to a decision, ought to be considered as falling within the same principle as any other Plaintiff.

Per Curiam. The objection, that this application is of the first impression, is of little weight. It is true, that the practice of compelling parties to give security for costs has already been extended from the case of foreigners to that of natives, and that a line must somewhere be drawn. But it must be drawn where in justice and reason it ought. There is no principle on which the Defendant in *replevin*, as to this matter at least, can be distinguished from any ordinary Plaintiff. The Defendant must give security.

Rule absolute.

Feb. 10. JOHN STEWARD, Esq. v. EDWARD LOMBE, Esq. and Others.

Where *A.* mortgaged land with a wind-mill on it, the execution of a *feri facias*, against one *William Burgess*, a wind-mill, (erected on a close of the plaintiff's wood) the deed containing also a bargain and sale of the mill; held that it could not be taken in execution by a creditor of *A.*, though *A.* remained in possession.

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in the occupation of *W. B.* to the injury of the plaintiff's estate and interest in the close and mill. There was subjoined to the other counts in the declaration, a count in trover for the materials composing the wind-mill. Plea general issue. At the trial before *Dallas C. J., Norfolk Summer Assizes, 1819*, it appeared that *W. B.*, by a mortgage deed, (which was set out in one of the counts of the declaration), dated the 6th March, 1818, in consideration of 1095*l.* paid to him by the plaintiff, had conveyed to the plaintiff, among several parcels of land, one particularly described, upon which the deed stated, "that the said *W. B.* had lately erected and placed a wind-mill," *habendum* to the plaintiff for one thousand years at a pepper-corn rent; and had bargained, sold and set over all that wind-mill of him the said *W. B.*, lately erected and placed by him upon one of the said pieces of land therein before described, together with all the sails, geers, &c. &c. *habendum* to the plaintiff, his executors, administrators or assigns, for ever; with a *proviso*, that the deed should be void upon the payment of 1095*l.* on the 5th June next ensuing the date of the deed. Then followed the usual covenants by *W. B.*, that he was owner of the hereditaments and mill, and had power to grant, and that, on default of payment of interest, the plaintiff might enter, receive rents, and sell the mill, &c. &c. *W. B.* remained in possession of the mill, which was stated to be removable at pleasure, was constructed in the usual manner, being an octagonal wooden edifice raised on a casement of brick-work, and anchored into the ground by spores and land-ties, part of the spores and the whole of the land-ties being one foot under the surface of the earth; the whole, except the brick-work, spores, and land-ties, was taken in execution by the Sheriff's officers, under a *fieri facias*, issued against *W. B.*, and directed to the Sheriff of *Norfolk*. The questions made at the trial were, whether the wind-mill

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was affixed to the freehold, or a mere chattel, — and, if a chattel, whether the property in it passed to the Plaintiff, he never having taken corporal possession? The jury, after finding that the wind-mill was not a fixture gave a verdict for the plaintiff, damages 270*l.*; which verdict the Defendant obtained leave to move to set aside. Accordingly, in *Michaelmas* term last, a rule *nisi* to set aside the verdict and enter a nonsuit, having been granted to *Blossett* Serjt.;

Frere Serjt. now showed cause against the rule. The wind-mill, as part of the realty, passed with the conveyance of the land; it would have passed even if not named. A wind-mill, perhaps, is entitled to be considered as part of the freehold, more peculiarly than any other building. Other edifices may, in almost every instance, stand by their own weight; but a wind-mill, exposed as it is, in an extraordinary degree to the force of the wind, requires a more powerful fixture than ordinary buildings; posts, spores, and tenants, must all be added, and the edifice be well anchored into the ground. The circumstance of the mill's being removable at pleasure, does not at all affect its freehold quality. Large buildings, such as wooden-barracks, are often removed,; even ancient abbies, castles, and crosses, have been carried away for the purpose of ornament or preservation; and it would be most dangerous to the titles of real property, if the Court were to enquire into the habits and dispositions of buildings, their aptitude for migration, and whether they have actually journeyed or no. The brick-work of this mill, at least, had never travelled. No creditors of the mortgagee's could have taken the mill on a *feri facias*; and if not, how should those of the mortgagor be better entitled? The question whether fixture or no, though often debated between landlord and tenant, heir and executor,

executor, tenant for life and reversioner, has never been raised as between mortgagor and mortgagee. But admitting the will to be a chattel, it passed by the deed conveying the term, in which deed it is expressly mentioned and sold. The consideration is good, and no presumption of fraud is alleged. The circumstance of the miller remaining in occupation, affords no such presumption; for it is not to be expected that a party who takes a mill in mortgage, shall go and inhabit it himself. By the constructive possession of the land, which passed by the deed, the Plaintiff took possession of the mill also, as far as was necessary, for there are many cases in which the property of a chattel passes without actual possession; as where chattels have been sold by a Sheriff, *Kidd v. Rawlinson* (a). The transfer, being *bonâ fide*, is not fraudulent, because made to a creditor; it would not be so even in bankruptcy, unless a fraudulent intention were proved, *Horn v. Baker* (b).

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Blossett Serjt. contra. If this mill can be proved to be part of the realty, no doubt it would pass with the land. But the jury have expressly found it to be a moveable, and this in conformity with the cases, which have all held, that a structure erected for the purposes of trade may be removed from the land. The parties themselves too, by the very terms of the deed, seem to have considered it as a chattel. If it be such, the property in it could only be conveyed by an actual transfer of possession [*Edwards v. Harben* (c)] and this applies with still greater force to the case of a pledge, for it is the actual transfer alone that can make a pledge any security. In *Horn v. Baker*, though it was decided, that, where the deed was so framed, the pledgor might

(a) 2 B. & P. 59.

(c) 2 T.R. 587.

(b) 9 East, 215.

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retain possession consistently with the security, yet it was laid down, that without an express provision to such effect, a transfer unaccompanied with possession was void as against a creditor. In the deed between the present parties, there is no expression by which the pledgor is enabled to return possession of his pledge; and the transfer between the parties, is not like a case of execution, where from the notoriety of the Sheriff's sale, no person is deceived, though the occupier becomes a purchaser, and remains in possession.

DALLAS C. J. The first question is, whether the property in dispute be a fixture or no? The jury found, that it was not; and, whether a barn or mill, or any other thing of the same kind be a fixture or no, is a question partly of fact, partly of law. When the fact is clear, the court will apply the rules of law as they are to be abstracted from decided cases, but every case of this sort must depend mainly on its own circumstances, whether arising between landlord and tenant, heir and executor, or creditors of mortgagor and mortgagee. However, it is not necessary to enquire, whether this mill is to be deemed a fixture or not; that question, therefore, which is frequently a question of considerable nicety I shall here pass over; and am willing to take it as the jury found, that the mill was not a fixture. If, then, it be a chattel, the question is whether it passes under this deed. That it does pass, it is impossible to dispute. Here is land conveyed, and conveyed with a description of the mill upon it; it passed, therefore, with the land; and, omitting to enter into the question whether it passed as a fixture and part of the land, it is sufficient that here the windmill is described as being situated upon the land. The next question is, whether, taking it to be a chattel, there has been such a possession of it as will
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pass the property? Now this is not a case in which a separate and actual possession could have been taken; for, whether the mill was legally a fixture or not, it was at all events actually fastened to the land, and it was not to be expected that the mortgagee should come to reside in a mill. Still it is said, that according to the case of *Edwards v. Harben*; actual possession is necessary to transfer the property in a chattel. Before we consider that case, it may be observed, that this question does not arise on the bankrupt law; it is not a case, in which possession and visible ownership by a bankrupt has tended to procure him an unmerited credit; and, even if it had been a case within the bankrupt laws, it would not have been a case in which the appearances could excite a false credit. This, however, is a case between mortgagor and mortgagee.

The case of *Edwards v. Harben*, has been dissented from often. In *Kidd v. Rawlinson*, Lord Eldon C. J. cites and sanctions the following passage from *Buller's nisi prius* (a). "The donor continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." *Kidd v. Rawlinson*, was a case of a bill of sale; but, the party taking the bill having permitted the party giving it to remain in possession, it was held, nevertheless, that the property remained in the party who received the bill. The present case is that of a mortgage, where the mortgagee, in conformity with the usual practice in such matters, permits the mortgagor to remain in possession. In the case of *Edwards v. Harben*, the goods were such as pass from hand to hand, and might, therefore, without inconvenience be transferred into actual possession; here, the chattel is of a very different description. It seems, there-

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(a) *Bull. N. P.* 258.

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tere, that the constructive possession of the land under the deed is a sufficient possession of the mill standing on the land; and the more so, as this was not an absolute conveyance, but a mere pledge to be kept till money lent on the security of it was repaid. The only possession possible, in such a case, did take place. I am, therefore, of opinion, that this rule must be discharged.

PARK J. It is not necessary here to go into the various cases of fixtures, as between landlord and tenant, heir and executor; the question before the Court is much narrower. Supposing *Edwards v. Harben* to be law, (though doubts have arisen as to the extent of the doctrine there laid down,) and possession to be necessary to confer the property in this mill, there has been such possession as was admitted by the nature of the case, which is very different from the case of goods capable of being transferred from hand to hand; the possession of these by a supposed vendor, after sale, may be a badge of fraud: but would it not be ridiculous if the mortgagee should be required to come from another part of the country, and turn miller in order to take possession of his security? This is a mortgage of land, by a party who is in the actual occupation of a mill, and if he relinquished his occupation it would probably defeat all the ends of his mortgage. No false credit has been created by the transaction, and therefore the verdict must stand for the Plaintiff.

BURROUGH J. The question is, whether *Burgess's* possession of this mill is fraudulent; and how can that be, when the title to the land was in the mortgagor, and the mill upon it? I am of opinion, that *Burgess's* possession was consistent with the deed, and, even if he had not made any conveyance, a *feri facias* could not have been executed on the mill. It has never been heard of, that
such

such a structure should be taken in execution. *Horn v. Baker* is a very important case. There the stills were set in brick-work, and let into the ground. Three of the vats were supported by, and rested upon, brick-work and timber, but were not fixed to the ground; and sixteen other vats stood on horses or frames of wood, which were not let into the ground, but stood upon the floor; and the Court took the distinction between goods fixed in their nature, and those which can pass from hand to hand; clearly holding, that those which were fixed, did not pass from the bankrupt to his assignees.

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RICHARDSON J. *Burgess*, being seised in fee of land and a mill, mortgages both. By abundant caution, the mill is mentioned in the deed, but without that, the mortgagee would have had it as part of his security. If *Burgess* had died, the interest in the mill would have descended to his heir; if he had conveyed the land, the purchaser would have been entitled to the mill without any mention of it. It might have been otherwise, had *Burgess*, as tenant for years, erected the mill. In *Pool's* case (a), the Court held, that the vat of a soap boiler, erected for the purposes of his trade, might be seized as a chattel by the sheriff; but here, if the mortgagee could not take the mill from the land against the will of mortgagor, neither could the sheriff. Though in the estimation of the jury, this was considered a chattel, yet it is *quodammodo* annexed to the land, and very distinguishable from that species of goods, of which the property usually accompanies the possession; and no false credit is promoted by the occupier's not being actually the owner. That actual possession is not in all cases necessary to transfer the property of chattels, appears from *Kidd v. Rawlinson*, and *Watkins v. Birch* (b). The mill could not have been moved without incon-

(a) *Salk.* 362.

(b) 4 *Taunt.* 823.

venience,

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venience, and the mortgagee could only take actual possession by entering on the land unnecessarily, or by occupying the mill to his own personal inconvenience; it was therefore perfectly consistent with the whole nature of the transaction, that the mortgagor should remain in possession; I am, therefore, of opinion, that the verdict for the plaintiff must be allowed to stand.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

Feb. 10.

HOME v. BENTINCK, in Error (a).

A plaintiff in error in the Exchequer chamber is not confined to the taking out one rule in each term, but may proceed as quickly as he pleases.

EVANS had moved for a rule to direct the officer of the Court to allow the Plaintiff to proceed in this cause as quickly as he wished, which the officer had refused to do, alleging, that only one rule could be taken out in each term, and that one had already been granted in the present cause.

The Court intimated an opinion, that the plaintiff ought to be allowed to proceed as quickly as he pleased, and the officer then acquiesced.

(a) The reporters are indebted to the kindness of a gentleman at the bar for the note of this case.

Feb. 11.

WILLIAMS v. THACKER.

Proceedings on a bail bond set aside, on the ground that it was

A RULE nisi had been obtained to set aside the proceedings in this cause, (which was an action on a bail bond), and also the bail bond, on the ground that given in a second action for the same cause, though the first action was non-prossed:

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the suit was a second action for the same cause; the first action had been *non-prossed*.

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Onslow Serjt. now showed cause against the rule, and contended, that it was not the practice to stay a second action where the first had been *non-prossed*. He cited in proof of this *Turton v. Hays (a)*.

Sed per Curiam, the exception as to judgment by *Non Pros*, does not apply where the second action is vexatious; and a second action for the same cause must always be deemed vexatious, unless the contrary is shown.

Rule absolute (*b*).

(*a*) 1 *Str.* 435.

(*b*) And see *Archer v. Champneys*, *ante*, 289.

WILLIS v. PECKHAM.

Feb. 11.

ASSUMPSIT to recover a remuneration for the Plaintiff's loss of time during his attendance on *subpoena* as a witness in the cause of "*Peckham v. Coles*," the money counts were added. At the trial before *Dallas C. J.* at the *Middlesex* sittings after *Michaelmas* Term 1820 it appeared, that the Plaintiff, a labouring carpenter, had been served with a *subpoena* in the last named action, that the defendant promised the plaintiff to pay him for his loss of time; that the Plaintiff attended at the trial, and gave his evidence, and that the defendant succeeded in his action against *Coles*, and, charged in his bill of costs, which was settled by the master against *Coles*, the sum of 3*l.* as paid to *Willis* for loss of time, which sum was received from *Coles* by the

A witness cannot recover a compensation for his time, though an express promise be given him, that he shall be paid for his loss of time.

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the defendant, but never paid to the plaintiff. It appeared, however, that the master refused to allow this sum expressly for loss of time, but allowed it under the head of general expences. The counsel for the defendant contended, that this action could not be maintained. That it was contrary to all practice to allow for loss of time; that the attendance of witnesses was a public duty, and they could recover for expences only; and that, even the express promise to pay, being without consideration, could not aid the plaintiff. The learned judge expressed his opinion decidedly, that the action could not be maintained. The jury, notwithstanding, having found a verdict for the plaintiff; leave was given to the defendant, to move to set aside the verdict, and enter a nonsuit. Accordingly,

Lens Serjt., on a former day, having obtained a rule *nisi* to that effect,

Vaughan Serjt. and *Bosanquet Serjt.* now showed cause against the rule, and finding that the inclination of the Court was against the allowance of any compensation for a witness's time, contended, that as the defendant had actually received the money, under the charge of general expences, the plaintiff was entitled to recover it upon the count for money had and received, or, at all events, upon the defendant's express promise to pay.

DALLAS C. J. There were in fact no expences, as the witness came but a short distance, and how could there be any consideration for a promise, when the witness was bound to remain to give evidence under his *subpœna*?

PARK J. Compensation for loss of time in attendance as witness is only allowed to medical men and attornies.

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The point has been settled in the King's Bench, by the case of *Moor v. Adam* (a).

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BURBROUGH J. and RICHARDSON J. concurred.

Rule absolute.

(a) 5 M. & S. 156.

BUTTERTON v. FURBER.

Feb. 11.

REPLEVIN on a distress for poor's rates.

Verdict for Defendant.

Hullock Serjt. having on a former day, obtained a rule *nisi* for the prothonotary to tax the Defendant treble costs, according to 43 *Eliz. c. 2. s. 19.*

The avowant in *replevin* on a distress for poor rates is only entitled to single costs, under 43 *Eliz. c. 2. s. 19.*

Vaughan Serjt. now showed cause against the rule: where a party was entitled to damages at common law, if treble damages are given by statute, he shall have treble costs also: *aliter* where, as in the present case, the party was not entitled to damages at common law, *Okely v. Salter* (a); and the statute of 43 *Eliz. c. 2. s. 19.* which is a penal statute, does not say the party shall have treble costs, but treble damages with his costs. The prothonotary refused to allow treble costs some years since, in the only case which has occurred of late years on this statute (b).

Hullock Serjt. in support of his rule. The point relied on in *Noy's* report of *Okely v. Salter*, is not men-

(a) *Noy. 137. S. C. Yelv. 176.*

(b) *Hempson v. Josselyn, Dec. 15. 1798.*

tioned

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tioned in *Yelverton*, who says, that the statute of *Eliz.* is not penal, but to be construed largely in aid of charity. And in *Lawson v. Story* (a), a case turning on stat. 2 *W. & M.* sess. 1. c. 5. treble costs were given: the words of that statute are in substance the same as those of the statute of *Eliz.* * the party being allowed in the former his treble damages and costs of suit. In the case provided for by that statute, damages would have been recovered at common law, but, that circumstance is not noticed in the report, as having influenced the judgment of the court.

DALLAS C. J. There seems to me to be no doubt on the construction of this statute, and still less on the case to which we have been referred. The question is, whether, where a statute gives treble damages in a case where none were recoverable at common law, treble costs are also to be intended; I see no ground for such a construction. The statute of *Elizabeth* says the party shall recover, not treble costs, but "his costs also." Treble damages constitute an enactment sufficiently penal, without adding treble costs. In the statute of *William & Mary* the expression is not the same: the word *and* may there be considered, as conjoining damages with costs; both the words and the collocation are different. The case in *Noy* is a direct authority against the Defendant.

PARK J. I am of the same opinion. The words of the act are decisive; there is much better reason for the Defendant's argument, where the copulative *and* is em-

(a) *Garth.* 321. 1 *Ld. Raym.* 19.

* The words of the stat. of *Eliz.* are "the same defendant to recover treble damages by reason of his wrongful vexation in that behalf, with his costs also, in that part sustained." The words of the stat. of *W. & M.* are "the person or persons grieved shall recover his and their treble damages and costs of suit."

ployed

ployed in the statute, than where the words are put disjunctively, as in the act of *Elizabeth*. Even if the case in Lord *Raymond* was rightly decided, (which I don't say,) it does not apply to the present question, the words of the two acts being so different.

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BURROUGH J. of the same opinion.

RICHARDSON J. In the case arising on the statute of *William & Mary* damages were recoverable at common law; here, we must rest on the words of the statute, which give the party treble damages with his costs. The report in *Noy* must be considered as accurate, notwithstanding the silence of *Yelverton*, as to one of the points mentioned.

Rule discharged.

GRILLARD v. HOGUE.

Feb. 12.

VAUGHAN Serjt., on a former day, had obtained a rule nisi for a *mandamus* to the Court in *India*, to examine witnesses on behalf of the *Defendant* in this case. The application was founded upon stat. 13 G. 3. c. 63. § 44. which, (after reciting that his majesty's subjects were liable to be defeated of the several rights, titles, debts, dues, demands, or suits, for which they had cause arising in *India*, &c. and, for preventing such failure of justice,) enacts "that when and as often as the united company of merchants of *England* trading to the *East Indies*, or any person or persons whatsoever, shall commence and prosecute any action or suit at law, or in equity, for which cause has arisen, or shall thereafter arise, in *India*, against any

Under the
13 G. 3. c. 63.
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witnesses on
behalf of the
defendant in a
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other person or persons whatever, in any of his majesty's courts of *Westminster*, it shall and may be lawful for such Court respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a *mandamus* or commission to the chief justice, &c. &c. as the case may require, for the examination of witnesses as aforesaid, &c."

Lens Serjt. now showed cause and contended, that the power of granting the writ to *Defendants* as well as Prosecutors, being only given by the 40th section, was, by that section, confined wholly to cases arising on indictment and information (a): And, that the 44th section, which related to civil cases, differed from the 40th both in wording and substance, and afforded the Court no authority to grant the writ on the application of the Defendant; nor was there any hardship in this; for, where it was necessary, the Court would stay proceedings on behalf of the Defendant.

Vaughan and *Taddy* Serjts., in support of the rule, were stopped by the Court.

DALLAS C. J. It would be most unreasonable, that a Defendant should not have this *mandamus* as well as a Plaintiff, but the first thing is to enquire, what the statute has provided; because, if the Defendant is thereby placed in a situation different from that of the Plaintiff, the Court cannot interfere. Upon the justice of the

(a) 13 G. 3. c. 63. which enacts that in all cases of *indictments* and *informations* filed or exhibited in the court of K. B. for *misdeemeanors* or *offences* committed in *India*, it shall be lawful for the said court, on motion made on behalf of the *prosecutor* or *de-* *fendant*, to award a writ of *mandamus* to the chief justice and judges of the supreme court of judicature, &c. to hold a court for examination of witnesses, and receiving proofs concerning the matters charged in such indictments.

case there can be no doubt ; the Plaintiff and the Defendant should stand on equal ground ; why, then, should this weapon be put into the hands of the Plaintiff, while the Defendant is left without any shield against it ? The only circumstance which induced me to pause, was, an idea, that, from the length of time which has elapsed since the passing of the statute, some cases might have arisen upon it. None have been referred to, and if none exist, I have no doubt on the question : the statute meant to give equal and mutual remedy to both the parties in a suit ; and the legislature does not appear to have contemplated any stay of proceedings on the part of the Defendant, as an equivalent for the advantage afforded to the other party.

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PARK J. I am of the same opinion. This is a remedial law, and in a case entirely new, like the present, we must put such a construction on the statute as is most consonant to justice. In the case of indictment, the remedy is expressly extended to both parties : why should the legislature adopt a different course with regard to actions ?

BURROUGH J. The act applies to both parties ; both are mentioned in one clause, and there is no express exclusion of Defendants in the subsequent clause ; it must be implied, that the legislature intended to include Defendants as well as Plaintiffs in the latter clause.

RICHARDSON J. Concurred.

Rule absolute.

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Feb. 12.

IN RE RICHARD PETER SMITH.

Where an attorney has been struck off the rolls of the *K. B.* on a report of the master, he will, on motion, be struck off the rolls of this court, unless sufficient cause be shown to the contrary.

LENS Serjt., on a former day, had obtained a rule *nisi* for striking the above-named attorney off the rolls of this Court on an affidavit stating, that he had been struck off the rolls of the Court of King's Bench for supporting his clerk in swearing falsely (as bail) that he, the clerk, was a lace manufacturer. The affidavit stated the report of the master finding the truth of the charge against the party, upon reading which report the court of *K. B.* ordered his name to be struck off; an addition was made to the affidavit at the suggestion of this Court, viz. that the report, of which the statement set forth in the affidavit was a true copy, was in the custody of the master.

Vaughan Serjt. was to have shown cause against the rule, but being unprepared with any affidavit, the Court held, that the report of the master under the circumstances above stated, was a sufficient reason for their making the

Rule absolute.

IRVING and Others, Assignees of CAMPBELL and
Others, Bankrupts v. MACKENZIE.

1820.

BY a letter dated the 9th of *February* 1816, and addressed to *Campbell* and Co., the Defendant gave *Campbell* and Co. the following guarantee: "My son *Charles Mackenzie*, lately informed me, that he was about to enter into some arrangements of a pecuniary nature for the house of Messrs. *Vigers* and Co. of which he is a partner, and, that it would be advantageous to One count of the declaration stated the consideration of a guarantee for 5000*l.* to be a certain credit to be given by G. and Co. to F. and Co. in a manner then
and there agreed upon between the parties. The evidence to support this allegation consisted of letters to the following effect.

"My son informed me he was about to enter into some arrangements of a pecuniary nature for the house of F. and Co. in which he is a partner, and that it would be advantageous to have such arrangements, or part of them, carried into effect by drafts by me on you, payable to him or his order; and that he was persuaded I would guarantee your ultimate security: I therefore give you such guarantee to the amount of 5000*l.*"

"I find that the house of F. and Co. has deemed it expedient to establish a credit with some house in *London*, upon such terms as may be agreed upon by the parties; and that my son has written to you to fix that credit with you, not doubting that I would guarantee your ultimate security. My regard for my son induces me to give the guarantee in question."

"I gave you a letter of ultimate guarantee to the amount of 5000*l.* for such arrangements of a pecuniary nature, as my son might enter into with you, or for such part of them as might be carried into effect by drafts by me on you payable to him or order; and as I am since informed, that such arrangements have been, or are about to be, extended to the amount of 8000*l.*, I give you my ultimate guarantee for the additional sum of 3000*l.*"

"My guarantee for 5000*l.*; my guaranteeing temporary aid on an emergency; my guarantee in the same year for 3000*l.*, which last in its plain sense marks the event of the temporary aid, make the whole of my guarantee against ultimate loss 8000*l.*, and distinctly limit it to that amount."

Held, that there was no variance between the contract above stated, and that made out by this evidence.

Another count, supported by the same evidence, stated the consideration of the guarantee to be "that G. and Co. would give F. and Co. credit, in manner then and there agreed upon." And the promise given on such consideration, to be a guarantee for 8000*l.*

Held also, that there was no variance between this statement and the evidence adduced in proof of it.

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have such arrangements, or part of them, carried into effect by drafts by me on you payable to him, or to his order; and he further stated, that he was persuaded I would readily guarantee you ultimate security against any loss that might arise to you from such arrangements, or from the acceptance of such drafts. I, therefore, hereby give you such guarantee to the amount of 5000*l.* sterling, and I request, that you will keep the amount of all such transactions separate and distinct from my private accounts."

On the same day, the Defendant addressed a private letter, as follows, to *D. Campbell*, one of the partners in the firm of *Campbell and Co.*: "By a letter received from my son, I find, that the house of *Vigers and Co.*, of which he is a partner, has, within these few months, had such an increase of business, that it is deemed expedient to establish a permanent credit with some house of respectability in *London* upon such terms as may be agreed to by the parties, for the purpose of meeting occasional contingencies, to which that increase may give rise; and he also writes me, that from his knowledge of my intimacy with your late uncle, he had expressed to you his wish to fix such credit with your house, not doubting, that I would readily guarantee your ultimate security: he has likewise stated to me the handsome manner in which you have agreed to this on your own part, expecting a similar concurrence on that of your partners, for which I beg leave to offer my best acknowledgements and thanks. My regard for my son, founded not only on paternal affection, but also on a knowledge of his abilities, and integrity of his character, induces me without hesitation to give the guarantee in question, which I transmit with this, under cover of *Vigers and Co.*, to be delivered in case of my son's absence, by Mr. *Vigers* the other partner in the house, of whose activity and extensive mercantile knowledge

ledge, I have the strongest reasons to think most favourably; and I shall be very much gratified if the connection between the two houses shall eventually prove advantageous to both. I think it right to mention these particulars to you, that you may be satisfied as to the nature of my guarantee, and that it is a real, and not a nominal one. You are at liberty, if you think proper, to communicate this letter to your partners, to whom as old acquaintances, I beg leave to offer my remembrances and regards."

By a letter dated the 21st of *June* 1816, and addressed to *Campbell* and Co. the Defendant gave *Campbell* and Co. the further guarantee following: "On the 9th of last *February*, I gave you a letter of ultimate guarantee to the amount of 5000*l.* sterling, for such arrangements of a pecuniary nature, as my son, Mr. *Charles Mackenzie*, might enter into with you for the house of Messrs. *Vigers* and Co. of which he is a partner, or for such part of them as might be carried into effect, by drafts by me on you, payable to him or order; and, as I am since informed, that such arrangements have been, or are about to be extended to the amount of 8000*l.* sterling, which leaves a deficiency in my ultimate security of 3000*l.* sterling; I hereby give you my ultimate guarantee of such additional sum of 3000*l.* to secure you against any loss that may ultimately arise to you from such additional arrangements."

On the 30th of *May* 1818, the defendant wrote to *D. Campbell* as follows: "My guarantee of the 9th of *February* 1816, to your house for 5000*l.*, my letter to you of the 22d *April* following guaranteeing temporary aid on an emergency, and my guarantee of the 21st of *June* in the same year, to your house for 3000*l.* (which last in its plain sense and meaning marks the event of the temporary aid mentioned in my letter of the 22d of

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April) make the whole of my guarantee against ultimate loss 8000*l.*, and distinctly limit it to that amount."

Assumpsit having been brought on this guarantee, the two counts of the declaration, which were found applicable to the whole of the Plaintiff's case, (the second and fourth) stated the consideration for the guarantee as follows; (second count) " And whereas before the time &c. said Defendant had, in consideration of certain credit to be given by the said *Duncan Campbell, B. H.* and *A. B.*(a) to the said *W. B. Vigers* and *Charles Mackenzie*, in manner *then and there agreed upon* between them, given the said *Duncan Campbell, B. H.* and *A. B.*, his guarantee to the amount of 5000*l.* of lawful money of *Great Britain* for their ultimate security against any loss that might arise to them from giving such credit; and the said *Duncan Campbell, B. H.* and *A. B.* had accordingly given such credit to *W. B. V.* and *C. M.* to a large amount, to wit, to the amount of 5000*l.* of like lawful money to wit, at, &c. and thereupon afterwards and before the bankruptcy, to wit, on, &c. at, &c. in consideration of the premises in this count mentioned; and also in consideration that *Duncan Campbell, B. H.* and *A. B.* at the special instance and request of the Defendant would extend the credit to *W. B. V.* and *C. M.* to the amount of 8000*l.*, the Defendant undertook, and then and there faithfully promised the said *Duncan Campbell, B. H.* and *A. B.* to guarantee them to the additional amount of 3000*l.* against any loss that might ultimately arise to them from giving such additional credit.

Fourth count: And whereas also heretofore, and before the bankruptcy, to wit, on, &c., at, &c., in consideration that the said *Duncan Campbell, B. H.* and *A. B.*, at the special instance and request of the De-

(a) The other partners in the firm of *Campbell* and Co.

fendant

fendant, would give credit to *W. B. V.* and *C. M.*, in manner *then and there agreed upon* between them, the Defendant undertook and faithfully promised *Duncan Campbell, B. H.* and *A. B.* before they became bankrupts, to guarantee their ultimate security against any loss that might arise to them from giving such credit as last aforesaid, to the amount of 8000*l.* sterling; and the said Plaintiffs, in fact, say, that the said *Duncan Campbell, B. H.* and *A. B.*, confiding in the said last mentioned promise, and undertaking afterwards and before the said bankruptcy, to wit, on the day and year last aforesaid, and on other days and times afterwards, did accordingly give such credit to the said *W. B. Vigers* and *Charles Mackenzie* to a large amount, to wit, to the amount of 8000*l.* of like lawful money.

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At the trial before DALLAS C. J. (*London* adjourned sittings, after *Michaelmas* term 1819,) the letters above set forth were produced as evidence to support the guarantee, the consideration whereof was stated in the pleadings as above. The jury found a verdict for the Plaintiffs.

A rule *nisi* having been obtained by *Bosanquet* Serjt., on a former day, to set aside this verdict and enter a nonsuit, among other reasons, on the ground of a variance between the guarantee stated in the declaration, and that produced in evidence; and

Lens Serjt., in showing cause against the rule, having contended, that the substance and legal effect of this guarantee was correctly described in the two counts above referred to, and was more especially borne out by the Defendant's third letter,

Bosanquet argued in support of his rule. It is clear from

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from the Defendant's letters, that, at the time he gave his guarantee to *Campbell* and Co., the manner in which *Campbell* and Co. were to give credit to *Vigers* and Co. was not settled and agreed upon, but was to be the subject of future arrangement. The first letter says, "My son informed me he was *about* to enter into some arrangements with you." The second states, that it was deemed expedient by *Vigers* and Co. "to establish a permanent credit with some house of respectability in *London*, upon such terms as *may* be agreed to by the parties." The third, "I gave you a letter of ultimate guarantee to the amount of 5000*l.* sterling, for such arrangements of a pecuniary nature as my son, Mr. *Charles Mackenzie* might enter into with you." Now, the second count states the consideration of the Defendant's guarantee for 5000*l.* to have been the credit to be given by *Campbell* and Co. to *Vigers* and Co. *in manner then and there agreed upon*. In *assumpsit*, the whole consideration for the promise ought to be fully and clearly stated; there would be an end of the precision of pleading, and of the notice of the nature of the Plaintiffs' demand, intended to be conveyed to the Defendant by a declaration, if arrangements forming the substantial part of the consideration of a promise, could be stated in so general and loose a way, as by the simple expression, "*in manner then and there agreed upon*." But, at all events, if so vague a statement can be made, consistently with the rules of pleading, it must be supported by evidence, and it must be shown that *some* manner of arrangement was actually agreed on at the time stated; whereas here, according to the Defendant's letters, the manner in which *Campbell* and Co. should give credit to *Vigers* and Co., so far from having been actually agreed on and settled, were at the time the Defendant gave his guarantee, completely *in fieri*. Then with respect to the fourth count: By the Defendant's

Defendant's letters, it appears that when he gave his guarantee for the 3000*l.*, *Campbell* and Co. had actually credited *Vigers* and Co. to the amount of 5000*l.* in consequence of the Defendant's former guarantee, so that a part at least of the consideration for the second guarantee was past and executed: But the fourth count states, that the Defendant gave his guarantee for 8000*l.*, and upon a prospective consideration, that *Campbell* and Co. would give *Vigers* and Co. credit, in manner then and there agreed upon; and the argument with respect to the unfounded statement, that the manner in which *Campbell* and Co. were to give credit to *Vigers* and Co. was then and there agreed upon, applies to this count as well as to the second.

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Their Lordships after conferring together, at the rising of the Court, gave it as their opinion, that no variance had been made out between the declaration and the evidence contained in the four letters.

Rule discharged.

KINGSTON and Another v. LLEWELLYN and
BELCHIER.

Feb. 12.

ON SLOW Serjt., on the 8th, obtained a rule *nisi* to quash the *capias ad respondendum* in this cause, and have the bail-bond delivered up to the Defendants to be cancelled, for irregularity, the Defendants christian names having been omitted; the writ only directing the Sheriff to take Messrs. *Llewellyn* and *Belchier*.

The defendants having signed a regular bail-bond, were held to have waived the irregularity of the omission of their Christian names in a *capias ad respondendum* directing the sheriff to take Messrs. *L.* and *B.*

Pell Serjt., in showing cause, read an affidavit, which stated that the Defendants had been arrested on the 30th of December, that the writ was returnable on the

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20th of *January*, and the declaration filed on the 24th. That one of the Defendants having been applied to on the 11th of *January* to execute a warrant of attorney, sent an answer on the 18th, promising to do so, and alleging the absence of his partner from town, as a reason for not having sooner complied with such request: That on the 20th of *January* both Defendants executed this warrant of attorney, and on the 27th called on the Plaintiff, promising to settle the business. The Defendants had regularly signed the bail bond. All these circumstances, together with the time which had been suffered to elapse before the application was made, constituted, as it was contended, a waiver of the irregularity.

Onslow in support of the rule. This writ is radically bad, and cannot be waived; besides, an application for mercy or time has never been held a waiver of irregularity. Nor ought the Defendants to have applied to the Court sooner. The time to take advantage of an irregularity is when the next step is taken, after the irregularity; the Defendants, therefore, were not called upon to apply before declaration filed. The writ is incapable of amendment, being equivalent to a general warrant. Under the order to take Messrs. *Llewellyn* and *Belchier*, any persons of that name might have been arrested, and no perjury could have been assigned if the affidavit to hold to bail ran in the same form.

Sed per Curiam. The bail bond is signed by the Defendants, and is regular. That circumstance is a sufficient waiver of the irregularity.

Rule discharged.

CARVICK v. BLAGRAVE.

1819.

Feb. 12.

THE Plaintiff, as assignee of one *Seth Thomas*, brought covenant for rent arrear against the Defendant, the immediate lessee of *Seth Thomas*. The declaration stated, that at the time of making the indenture after mentioned, *S. T.* was lawfully possessed of certain premises, that is to say, for the remainder of a term of twenty-two years, commencing from the 25th of *December* 1797, to come and unexpired, and that, being so possessed, he, on the 7th of *March* 1811, by indenture, demised the premises to the Defendant, to hold, from the 20th of *December* then last past, for a term of nine years, at a rent of 420*l. per annum*. The declaration then stated the covenants of the Defendant on which the action was brought, and the breaches assigned, but no question turned on those breaches. The declaration then stated the Defendant's entry into the premises; and that *S. T.*, being possessed of the said premises for the remainder of the said term of twenty-two years, subject to the said lease for nine years, by another indenture granted, bargained, sold and assigned the said premises, and all his estate and interest therein to the Plaintiff for the residue and remainder of the said term of twenty-two years, *virtute cujus*, the Plaintiff became and was, and still is possessed of the premises for the remainder of the said term. The Defendant (the lessee) pleaded in bar, that *S. T.* was not, at the time of making the said indenture of lease, possessed for the residue and remainder of the said supposed term of twenty-two years, in manner and form as the declaration mentioned.

In covenant by assignee of lessor against lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a term of 22 years commencing on, &c. is material and traversable.

General demurrer and joinder.

Pell

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Pell Serjt. in support of the demurrer. The Defendant having accepted a lease from *Seth Thomas*, and having entered and enjoyed under it, is estopped from saying that his lessor had not the estate in question. If *Thomas* himself, before the assignment, had brought an action, and had stated his title as it is stated here, (which statement he would not been bound to make,) the Defendant could not have put such statement in issue. If he was estopped from doing this as against *Thomas*, he is equally estopped as against his assignee; for all privies in estate may take advantage of estoppels (a). Where an estoppel works on the interest of the land, it runs with the land into whatever hands the land comes, *Trevivan v. Lawrence* (b); and the assignee may take advantage of it, *Palmer v. Ekins* (c). But this allegation, that *Thomas* was possessed for the residue of a term of twenty-two years, is but matter of inducement, and being laid under a *scilicet*, need not be proved precisely as alleged; neither can it be traversed. Now the Defendant has, in effect, traversed it; for, his denial is tantamount to a traverse, *Lambert v. Stroother* (d). It would have been sufficient to allege in the declaration, that *Thomas* was lawfully possessed, without showing any title at all, *Com. Dig.* (e); and the Defendant cannot, by any form of pleading, tie the Plaintiff down to the proof of an allegation, which is but surplusage. Nor can the Defendant incur any inconvenience from this form of pleading: for, if the Defendant had been evicted from any defect in the title, or on the expiration of his lessor's interest, he might have pleaded such eviction with success, though the interest should appear on the face of the declaration to be still subsisting. *Parker v. Manning* (f). *Palmer v. Ekins* as reported by

(a) *Co. Lit.* 352. a.(d) *Willes*, 224.(b) 1 *Salk.* 276.(e) *Tit. Pleading*, c. 43.(c) 2 *Str.* 818. S. G. Ld.(f) 7 *T. R.* 538.*Raym.* 1550.

Strange, seems conclusive as to the point, that an allegation of title in an action like the present, is immaterial, and cannot be traversed. The language of the 6th resolution in that case is, "That if the plea did not amount to *nil habuit in tenementis*, yet it would be ill, on account of the generality of the traverse, which ties up the Plaintiff to prove the estate alleged in the declaration, when any other estate would do; even a disseisin would do in this case, where it appears the tenant enjoyed under the lease. And it is no answer to say that the Defendant has traversed in the words of the declaration, for unless it be materially alleged, he is not to follow it."

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Blossett Serjt. contra. The doctrine of estoppel has been laid down much too broadly on the other side. It is admitted, that a lessee is estopped from saying, that his lessor had no title at the time of granting the lease; but he is not estopped from saying, that such title expired at a subsequent period. So in the present case, the lessee is not estopped from showing, that his lessor's term has expired; and he puts this in issue by saying, that the lessor had not a term for twenty-two years. If the law were otherwise, the lessee would be under a great hardship, as there are many inconveniences short of actual eviction, which he would incur under a disputed title. When the action is brought by the lessor, allegation of title may be immaterial and surplusage; but the case is different where the action is brought by his assignee. The assignee must state a legal title on record, or he has no right to recover; the Defendant may take advantage of any defect in that title, and every part of it is, therefore, material and traversable (*a*). The defendant is not confined to objections as to the length of *Thomas's* term, but may dispute the very existence of

(*a*) *Dyer*, 365.

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it. The assignee having declared, that *Thomas* transferred an interest by bargain and sale, the Defendant may deny that any such interest passed. Indeed, from the very mention of the bargain and sale, he is led to infer, that there was some interest other than the term for years. The authority referred to in *Comyns's Digest*, goes to confirm this argument. It is there laid down, "that if a plaintiff alleges a title, even unnecessarily, he gives the defendant the power of traversing it." At all events, admitting this to be an immaterial traverse, it can only be objected to on special demurrer, according to the express provision of the stat. 4 *Ann.(a)*, *Com. Dig.(b)*. Lord *Raymond* takes no notice of the sixth resolution in *Palmer v. Ekins*, as reported by *Strange*, though he delivered and also reported the judgment. The point, too, in that resolution is wholly extrajudicial.

Pell in reply. It is expressly laid down in *Palmer v. Ekins*, that the Plaintiff's objection may be made on general demurrer. It is true, that Lord *Raymond* does not notice the sixth resolution in that case, as reported by *Strange*. But *Strange* was of counsel in it himself, and Serjt. *Williams* confirms the doctrine of that resolution, though it is clear he had both the reports in view(a). He also adverts to the case in *Dyer*, and shows that it is clearly distinguishable from *Palmer v. Ekins*.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court. — The question in this cause arises on a demurrer to the first plea to the declaration. (Here his lordship stated the pleadings.) The objections to this plea appear to the Court to resolve themselves into two. First, that the plea

(a) c. 16. s. 1.

(c) 2 *Wms.'s Saund.* 207. n.

(b) *Pleader*, G. 11.

to this, that the lessor *Seth Thomas* had nothing in the premises. Second, that it puts in issue the precise extent of the term, which it is said *Seth Thomas* had in the premises. The first of these objections is wholly unfounded. It is assumed, that the question is the same as it would have been, if *Seth Thomas* had brought the action, and alleged himself possessed of the term of 22 years in the manner here alleged. The answer to this is, that, in such an action by *Seth Thomas*, the defendant would have been estopped from disputing the lease; and the Court must have treated such an allegation as mere surplusage, and not traversable by the lessee; for, as between him who had accepted the demise and his lessor, it was totally immaterial what the title of the lessor was. Between them the estoppel was in full force. This estoppel has equal effect between the lessee and one who is privy, or, in other words, derives his legal title from the lessor. But the lessee is under no engagement to any one, who is not the legal assignee. The allegation of the possession by *Seth Thomas* for a term of 22 years is made by the assignee and not by *Seth Thomas*; and the lessee has a right to know whether there is a privity between him and the assignee by means of a conveyance by the lessor of the true title. From the nature of the case, he cannot be prevented from putting in issue any material fact alleged by the assignee. The case of *Palmer v. Ekins* (a) was very different from the present case; the Court thought the plea, there, amounted to a plea of *nil habuit in tenementis*. It is admitted on all hands that such a plea is bad; there is no difference in substance between a general plea of *nil habuit in tenementis* and a special plea of *nil habuit in tenementis*. If the effect of the plea is to dispute the interest, which a lessee

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(a) 2 Str. 817. S.C. Ld. Raym. 1550.

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took under a lease from a *lessor*, the plea is bad whatever shape it assumes.

The present plea leaves the lease in the state in which the Plaintiff has stated it: and the Defendant merely says, the title you allege, as that which was assigned to you, is not the true title.

The second objection is, that, by this plea, the precise extent of the term stated in the declaration is put in issue; and, that the Plaintiff's case would be defeated, if it appeared that his term was not of the precise extent alleged. If that be so, it is the Plaintiff's own fault. If the precise term is materially alleged, the defendant cannot be prevented from traversing it. But, we think such consequence will not follow. The plea puts in issue the substance of the allegation, and the substance of it is, that *Seth Thomas*, being possessed of a term, made a derivative demise to the Defendant. The substantial question, therefore, at the trial of such an issue, would be, whether *Seth Thomas* had a larger term, out of which he could carve this lesser term? It is wholly immaterial, whether it was a year, a month, or a day longer than the derivative term: any term for years, which left the reversion in him, and enabled him to assign, would satisfy the substance of the allegation. The issue, here, is joined on the very point of the Plaintiff's title to recover, and, therefore, according to the principle laid down in *Littleton* (a), and recognised in *Buller's Nisi Prius* (b), the plea, by traversing *Seth Thomas's* possession of the term, in manner and form alleged, puts the issue on the very point of the action. The section in *Littleton* runs thus: "To this it may be said, that the words "*modo et formâ prout*, &c. in many cases are words of form of pleading, and not words of substance; for, if a man bring a writ of entry in case

(a) s. 483.

(b) 300.

proviso of the alienation made by the tenant in dower to his disinherittance, and counteth of the alienation made in fee, and the tenant saith, that he did not alienate in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict, that the tenant aliened in tail, or for term of another man's life, the demandant shall recover; yet, the alienation was not in manner as the demandant hath declared, &c." The case of *Pope v. Skinner* (a), is to the same effect: Where the Defendant in replevin avowed taking the Plaintiff's cattle as damage *feasant* in April, the Plaintiff pleaded in bar, that one *Williams* was seised of a house and land, &c. whereunto he had common, and demised the same to him on the 30th day of March, to hold from the feast of the Annunciation next before, for a year. The avowant traversed the lease *modo et formâ*, whereupon issue was taken, and the jury found, that *Williams* made a lease to the Plaintiff on the 25th day of March, for one year from thence next ensuing. And though this be not the same lease that the Plaintiff pleaded, (for this begins *on* the day, and the other *from* the day,) yet the Court gave judgment for the Plaintiff, for, the substance of the issue is, whether the Plaintiff had such a lease or no from *Williams*, as by force thereof he might use the common at the time? — which appeared for him in this case, and the *modo et formâ* is not material. So, in the case at bar, had it gone to trial, and the jury had found that *Seth Thomas* was possessed of a term of 22 years, wanting one day; the substance of the issue would have been found, and the Plaintiff equally entitled to the reversion, and consequently to maintain his action.

Judgment for the Plaintiff.

(a) *Hob. 72.*

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The count stated, that the plaintiff had retained the defendant as agent to cause the plaintiff's ship to proceed "to *Gottenburgh*, in order that she might afterwards proceed to *St. Petersburg*;" the chief evidence adduced in support of this allegation was a written arrangement agreed upon between the plaintiff's managing clerk and the defendant, (in which it was ordered, "that the ship should touch at *Gottenburgh* to know the state of things in *Russia*, and receive instructions." And "that the captain should consign the ship to defendant's

correspondents at *St. Petersburg*, or any other place she might land her cargo at:" and a conversation between the plaintiff's clerk and the defendant, in which defendant said "he had insured the ship from *Falmouth* to *Sbeerness*, that at *Sbeerness* she would join convoy to go to *St. Petersburg*, and that he would insure her from *Sbeerness* to *Gottenburgh* and from thence to *St. Petersburg*."

Held, that there was a fatal variance between the count and the evidence.

defendant

ACTION on the case against the Defendant for misconduct as an agent. The declaration consisted of many counts, in which the terms of the defendants' engagement with the plaintiff were set out, and two counts in *trover*. At the trial before *Dallas C. J.* at the *London* sittings, after *Trinity* term, 1819, all the counts of the declaration appearing to be inapplicable to the plaintiff's case, with the exception of the counts in *trover*, which applied only to a part of the case, the jury found a verdict of 15,000*l.* damages for the plaintiff on those counts, (the 13th and 14th.)

The tenth count of the declaration ran in substance thus:

Whereas before, &c. the Plaintiff, was and from thenceforth until, &c. was the owner and proprietor of a certain other ship or vessel with certain other goods on board thereof, lying at or near *Falmouth*, the said last-mentioned ship or vessel and goods being of great value, to wit, the value of 100,000*l.*, to wit, at, &c. And whereas before, &c. to wit, on the 11th of *September*, 1812, at, &c., the plaintiff at the request of the defendant had retained and employed the defendant as his agent in that behalf, to cause and procure the said last-mentioned ship, with the said last-mentioned goods therein to proceed with all reasonable and proper dispatch in that behalf to certain parts beyond the seas, to wit, to *Gottenburgh*, in order that the same might afterward proceed to *St. Petersburg* aforesaid, whereof the

defendant had notice, and then and there accepted the said last-mentioned retainer and employment. And thereupon it became, and was the duty of the defendant, by reason of the premises last aforesaid, to cause and procure the said last-mentioned vessel and goods therein to proceed with all reasonable and proper dispatch to *Gottenburgh* aforesaid. *Breach*, that by and through the improper conduct of the defendant in that behalf, the said last-mentioned ship and goods did not proceed with such last-mentioned reasonable and proper dispatch to *Gottenburgh* aforesaid; but on the contrary thereof, in consequence of the improper conduct of the defendant in that behalf, remained and continued for a long and unreasonable time in this country, to wit, at &c., and the said last-mentioned voyage was never effected. And the said defendant afterwards converted and disposed of the said last-mentioned vessel and goods to his own use, by means of which premises the plaintiff lost and was deprived of divers great gains, profits, and advantages, which he might and otherwise would have derived and acquired from the said last-mentioned goods and the sale thereof, at *St. Petersburg* aforesaid; and also lost all the benefit and advantage which he might and otherwise would have derived from importing the said last-mentioned goods into the port of *St. Petersburg* aforesaid by virtue of a certain licence or permission from the government of *Russia* aforesaid, whereby he had become legally entitled so to import the same, &c. &c. &c.

The evidence, which the plaintiff insisted on as being applicable to this count, was as follows. A conversation between the defendant and the plaintiff's clerk, *Duarte Lloyd*, who had full powers to act and settle on behalf of his principal; a written arrangement entered into by the plaintiff's clerk and Defendant in conse-

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quence of this conversation; and the testimony of *Andrea Dubatchefsky*, the *Russian* consul.

Duarte Lloyd stated, that he enquired, upon his interview with the Defendant, why the ship had not been dispatched to *St. Petersburg* pursuant to the orders of the Plaintiff. The Defendant said, that he could not effect the insurance for fear of a seizure in port, and was answered by the clerk, that the *ukase* (which the plaintiff had previously obtained) admitted this ship and another. The Defendant then said, that he could not let the ship go, till a balance due to him from the plaintiff was paid; and, after some difficulty with regard to the security, the following arrangement was entered into. A writing (a copy of which is below set forth) was drawn up by the witness in the defendant's counting-house, and handed to the defendant, who altered and interlined it in several places.

London, 22d Sept. 1812.

Messrs. Firmin De Tastet, & Co.

Gentlemen,

In consequence of Mr. Lopes writing to you, that he wished you to arrange with me the affairs of his ship, *Mercurio Felix*, so that said ship might proceed on her voyage to *St. Petersburg*, and after the various interviews I have had with you on the subject, I am of opinion, that, for the interest of Mr. Lopes, under the present circumstances, *since you are so good as to consent to all the necessary advances*;

1st. The ship and cargo should be valued at 15,000*l.* say fifteen thousand pounds sterling, and insured in that sum, viz. 11,000*l.* cargo, 4,000*l.* ship.

2d. That the ship should touch at *Gottenburgh* to know

know the state of things in Russia and receive instructions, and a clause be inserted in the policy accordingly.

3d. That if you think proper it would not be amiss to insure in the first instance the ship and cargo from only Falmouth to Sheerness, as in the interval we may receive news whether or not it would be safe that she should proceed to Russia. The above is what remains for me to give my opinion upon, as acting under Mr. Lopes's authority, and if you approve it, I request you will act accordingly, it being already settled that the Captain shall give you a bottomry bond for the money which he has already received; and that, for the sums which you some time ago advanced on this same ship, and those which you have to make to enable her to proceed on her voyage, the same Captain is to sign bills of lading of the cargo to your order, and that he shall consign his ship to your correspondents at St. Petersburg, or any other place she may land her cargo at; the whole being under your control, and at your entire disposal for reimbursement, or until you are actually reimbursed (a).

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It was then stated by the witness, that the defendant afterwards informed him, that he, the defendant, had insured the ship from Falmouth to Sheerness for 15,000*l.* ship and cargo, that at Sheerness she was to join convoy to go to St. Petersburg, and that he would insure her from Sheerness to Gottenburgh and from thence to St. Petersburg. The ship, it appeared, afterwards came round to Sheerness, but did not proceed on her voyage: for the Defendant, on the ground that she wanted refitting, had her brought up to London, and afterwards employed her in his own service, in order to pay himself a balance alleged to be due to him from

(a) The words in Italics were interlined or altered by the defendant.

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the plaintiff. *Dubatchefsky* stated, that the Defendant alleged as a reason for not sending the ship to *St. Petersburg*, that he apprehended a seizure in port.

Lens Serjt. in the last term had obtained a rule *nisi* for the Plaintiff to enter a verdict for 34,780*l.* on the first, second, and sixth counts of the declaration, or for the sum of 28,324*l.* on the tenth count instead of the verdict then standing for 15,000*l.* on the thirteenth and fourteenth counts. The rule, however, as far as regarded the first, second, and sixth counts was ultimately abandoned, and the argument turned only on the applicability of the above evidence to the tenth count.

Vaughan Serjt. in showing cause against the rule, argued, first, that the count was bad, as the action (though in form *ex delicto*,) was in substance founded on a contract, and in such cases it was necessary to state accurately the consideration and the contract (*a*); neither of which, as stated in the count, corresponded with the agreement produced in evidence. Secondly, that even admitting the count to be good on the face of it, the evidence adduced to support it, did not in any way prove the allegations it contained. The count stating an engagement to send the ship to *St. Petersburg* at all events; the evidence showing that the ship was to be sent thither only on a certain contingency.

The Court observing, that if the evidence adduced was insufficient to prove the statement contained in the count, it would be needless to decide whether the count was good or bad, called on

Lens and *Hullock* Serjts. to support the rule, by

(*a*) *Weall v. King*, 12 *East*. 452. *Max v. Roberts*, 2 *N.R.* 454.

showing

showing that the evidence in question was applicable to the tenth count. They then contended, that in actions *ex delicto*, though founded on a contract, and especially in those which turn on misfeasance, the details of the business, in which the defendant has been employed, are mere matters of inducement and need not be strictly alleged or proved. It was sufficient to show, that the defendant has been employed for the plaintiff, and has misconducted himself: the terms on which he engaged, and the details of his employment, though constituting a necessary part of the statement and proof in actions *ex contractu*, were superfluous in actions *ex delicto*. In *Weall v. King* judgment went against the plaintiff, not for any misstatement of the terms of the warranty; but because he failed to sue the parties legally responsible: the warranty having been given by two persons jointly, neither of them would be singly chargeable for the whole; the several action therefore against one of the parties charged him with that, to which he had never rendered himself liable. So in *Max v. Roberts*, the plaintiff, having failed in proving all the defendants to be owners of a ship by which his goods were to be carried to *Waterford*, was not allowed to recover against the others for a deviation. In no case had it ever been laid down, that, in actions *ex delicto*, it is necessary to state or prove strictly the terms of the employment out of which the alleged misfeasance arises. In the present case it was sufficient to show, that the defendant was employed to send out the plaintiff's ship, and that he misconducted himself in that employment. Whether the ship was to go to *St. Petersburg* or *Gottenburgh*, or to *St. Petersburg* contingently, or at all events, were matters which it was wholly superfluous to state or prove; and, the statements having been made under a *videlicet*, the plaintiff had not, even in form, bound himself down to the proof of them. It was, in fact, intended by both parties that
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the ship should proceed, if possible, to *St. Petersburg*, that intention was stated in the count, and the evidence both oral and written could have no other effect than to convince the jury of the existence of such an intention. So completely did the evidence warrant them in drawing that conclusion, that, if they had expressly found a verdict on the tenth count, it would have been impossible to set aside such a verdict on the ground of its being contrary to evidence: an incontestible proof, that the evidence fully bore out the substance of the allegations in that count contained.

DALLAS C. J. I think that, in this case, the count in question is not supported by the proof; and the application before the Court is, merely, for permission to enter the verdict upon this particular count, if the evidence given in the cause can warrant such an entry. In this stage of the discussion we have nothing at all to do with the consideration, whether, inasmuch as the verdict is, in point of fact, taken the other way upon this count, we can alter the verdict or not; because, if we should be of opinion that the count, as framed, is not supported by the evidence as given, then that consideration which is ulterior will not arise. The first question, therefore, for our consideration, and the only question at present is, whether the evidence given in the cause, supports the declaration? Now with respect to that, there is alleged upon the face of the tenth count an employment of the Defendant Mr. *De Tastet* by the Plaintiff Mr. *Lopes* with an allegation, that the Defendant accepted that employment; and then the count alleges, that out of that employment a certain duty arose, and the complaint is of a breach of the duty as created by such employment. Now, without going critically into the enquiry how far, in cases founded in contract, the entire consideration must be alleged; and what, as distinguished from these cases, it may or may not

not be necessary to allege in actions merely of *tort*, I think I may safely go this length, that, wherever a party seeks to recover for a breach of duty growing out of an employment, he must state that employment truly; and, beyond this, that, (whether a party be bound to state it truly or not, and if bound to state it truly, whether he be bound to state it more or less extensively,) still in every case he is bound to prove the employment as he has actually alleged it: and therefore the only question, as it strikes me, is, whether the employment alleged in the tenth count of this declaration be or be not correctly sustained by the evidence? Now that depends upon the allegation in the count; and the allegation states an employment and retainer of the Defendant by the Plaintiff, that he shall "procure the ship to proceed with all reasonable and proper dispatch, in that behalf, to certain parts beyond the seas, to wit, to *Gottenburgh*;" and the allegation does not stop here, but it goes on to state, as part of the entire duty, "in order that the same might afterwards proceed to *St. Petersburg*." It is, therefore, alleged to be an entire undertaking, upon the part of the defendant, that the ship shall proceed to *Gottenburgh* in the first instance, for the purpose of going on absolutely to *St. Petersburg*: and not only, in form, is there an essential difference between stating an absolute destination to *St. Petersburg*, and a conditional destination; but there is an essential difference in the nature of the thing; because an absolute undertaking, or conditional undertaking, that the ship shall proceed to *Gottenburgh* to ascertain whether she may proceed to *St. Petersburg*, is, in the nature of the thing, different from an undertaking that the ship shall proceed on a voyage, at all events, to *St. Petersburg*. It therefore appears to me, that, inasmuch as in the paper given in evidence, the undertaking is only to forward the ship to *Gottenburgh* in order to ascertain, whether she ought to proceed to *St. Petersburg*, it is different from

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from the undertaking stated in the tenth count, which is an undertaking that the ship shall proceed to *St. Petersburg*, touching only at *Gottenburgh*. There is, therefore, a variance between the evidence and the declaration, and consequently, the verdict cannot be entered for the plaintiff on this count.

PARK J. At present we have only to do with the tenth count. My brother *Hullock*, who argued with great ingenuity, attempted to show that the count was good; there is not the least difference of opinion on that head. In all that class of cases to which he has properly directed his attention, from *Powell v. Layton*, down to the last case, which has not been mentioned, of *Green v. Greenbank (a)*, supporting the case of *Weall v. King*, I take the rule to be, that, whether a party proceed in form *ex delicto*, or, in form *ex contractu*, yet, the contract must be stated to raise the duty and employment; and, therefore, the question is here, whether there is any evidence raising this duty and employment in Mr. *De Tastet*, in the manner stated in this count? On this point, I cannot agree with the arguments used by my brother *Hullock*, but fully agree with the opinion pronounced by his lordship, namely, that it is impossible to say, that an undertaking for a conditional voyage to a place, under certain contingencies, can possibly support an undertaking for an absolute voyage to that place. In the paper given in evidence, there is not one word about *St. Petersburg*, except in the introductory and latter parts of it. The introductory part only states Mr. *Lopes's* wish, that this vessel might proceed on her voyage to *St. Petersburg*, and, the part relied on to support the declaration is, not, that Mr. *De Tastet* undertakes to cause and procure her to be sent, but, "that the ship should touch at *Gottenburgh*, to know the state of things in *Russia*, and

(a) *2d. Marsh. 485.*

receive instructions." Can this evidence possibly support an express statement, that Mr. *Lopes* retained and employed Mr. *De Tastet*, and, that Mr. *De Tastet* undertook that retainer and employment, to cause or procure the ship to proceed "to *Gottenburgh*, in order that she might afterwards proceed to *St. Petersburg*?" The ship was to proceed, provided the state of things at *Gottenburgh* rendered such proceeding safe. It, therefore, seems to me, that, the tenth count of this declaration is not supported by the evidence given in the cause; and, therefore, it is impossible for the Court to accede to the application of the Plaintiff.

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BURROUGH J. Whether this action is in the shape of *tort* or *assumpsit*, the employment must be truly stated and proved, and the question is, whether it has been proved in this case. It appears, by the letter of the 22nd. of *September*, that it was doubtful, whether it would be safe, that the ship should proceed to *St. Petersburg*; when was that doubt to be cleared up? When she got to *Gottenburgh*. It is quite clear, that the allegation is properly laid in the declaration; but the question, what course the ship was to take, after her arrival at *Gottenburgh*, was not to be decided till she came there; whereas the frame of the declaration is, that she was to go to *Gottenburgh*, in order to proceed to *St. Petersburg*. That is not true, because it could not be known till the ship arrived at *Gottenburgh*, whether she was to go further or not. — Then is not that a condition, which was in the contemplation of the parties; and was not the employment to depend on circumstances, which might not be known when the ship left this country, and which could not be certainly known till she got to *Gottenburgh*? It is quite clear, that the ship was not to go direct to *St. Petersburg*, but, that her ultimate destination was to be decided and acted on at *Gottenburgh*.

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tenburgh. I am clearly of opinion, therefore, that this count is not sustained by the evidence.

Rule discharged. (a)

(a) RICHARDSON J. who, while at the bar, was in the case, had left the Court.

RICHARD GATHORNE BUTT, Esq. v. Sir NATHANIEL CONANT, Knt.

A justice of peace has authority to issue his warrant for the arrest of a party charged with having published a libel; and, upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law.

TRESPASS. The declaration stated an assault and false imprisonment, whereby Plaintiff was injured in his circumstances, &c. &c.. The Defendant pleaded, Not Guilty. A special verdict found, that, on the 5th March 1817, the Plaintiff unlawfully composed and published, and caused to be stuck up, affixed and distributed in divers public streets and places, within the city and liberty of *Westminster*, in the county of *Middlesex*, and elsewhere, a certain libel, intituled "Fair Play's a Jewel;" which libel was as follows, "Whereas Lord Chief Justice *Ellenborough*" (thereby meaning the Right Honorable *Edward Lord Ellenborough*, then being Chief Justice of His Majesty's Court of King's Bench, since deceased) "has committed a robbery of 1000*l.* upon me" (meaning the said Plaintiff) "by passing a sentence to make money, and to put the king's fines into his own pocket, instead of going into the public Treasury; I do hereby placard him as a disgrace to the bench of judges, the society of gentlemen, and the nation at large," signed "*R. G. Butt*," (meaning the Plaintiff). And also a certain other libel, intituled "Pillory, Pillory."

"Mr.

"Mr. *Butt* (meaning the Plaintiff) and Lord *Castlereagh*," (thereby meaning the Right Honorable *Robert Henry*, Lord *Castlereagh*, then and still being one of His Majesty's privy counsellors, and a member of the House of Commons,) which last mentioned libel was as follows "I" (meaning the Plaintiff) "do hereby placard Lord *Castlereagh*" (meaning the said *Robert Henry* Lord *Castlereagh*,) "for having stated a gross falsehood in the House of Commons, in the debate on the 11th *July* 1814, when I was a prisoner in the King's Bench prison, to answer his own purposes, in stating to the house, as reported in *The Times Newspaper* of the 12th *July* 1814, that I had petitioned the government for the mercy of the crown, and, upon which case the pillory sentence was taken off. My petition was to the Prince Regent to be liberated, being unjustly convicted by Lord *Ellenborough*," (meaning the said *Edward Lord Ellenborough*, as such Chief Justice as aforesaid) "to make money of me," signed "*R. G. Butt*," (meaning the Plaintiff). That, on the 6th *March* 1817, after the composing, &c. of the above libels by the Plaintiff, information thereof on oath was duly laid before the Defendant, then, and still being one of the justices of our lord the king, assigned to keep the peace in and for the city and liberty of *Westminster*, in the county of *Middlesex*, and also to hear and determine divers felonies, &c.; on which information, the Defendant granted his warrant, under his hand and seal of office, for the apprehension of the Plaintiff, for publishing the said libels, in order, that the Plaintiff might be brought before the Defendant, or some other justice of the peace for *Westminster*, to be examined and dealt with according to law. The special verdict, then stated the warrant (a), and, that

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(a) The warrant dated 6th *March* 1817, at the public office *Bow-street* was directed "To all constables and others His Majesty's officers of the peace, whom it may concern" commanding them to take

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that the Defendant, on the 7th *March* 1817, caused the Plaintiff to be arrested and taken into custody on the said warrant for publishing the said libels, and to be brought before the Defendant as such justice, to be examined and answer before him, touching and concerning the publishing of the said libels by the Plaintiff, to be dealt with according to law; and, that on the neglect of the Plaintiff to find sureties to answer in due course of law, for publishing the said libels, the Defendant, as such justice, by his certain other warrant, committed the Plaintiff to the custody of the keeper of His Majesty's gaol of *Newgate*, (the said gaol being preferred by the Plaintiff to any other) and required the said keeper to receive into his custody the body of the Plaintiff (charged before the Defendant as above stated) and him safely keep for want of sureties, and until the Plaintiff should be discharged in due course of law; wherefore the Plaintiff was committed, and taken into the custody last mentioned, and was afterwards convicted and found guilty of the said libels in due course of law. The special verdict further stated, that the several acts in the declaration mentioned, and therein complained of as trespasses, were done and committed by the Defendant, under, and in pursuance of the said warrants so issued and granted by him as aforesaid, and in prosecution thereof, and not otherwise; but whether, &c.

take and bring before the Defendant or some other of His Majesty's justices of the peace the body of the Plaintiff "to answer all such matters or things as, on His Majesty's behalf, shall on oath be objected against him, for that he on the 5th *March* instant did publish and cause to be published a certain wicked, scandalous and malicious libel, imputing the crime of robbery to *Edward Lord Ellenborough* Lord Chief Justice of his Majesty's court of *King's Bench*: and another wicked, scandalous and malicious libel imputing to *Robert Henry Lord Castlereagh*, that he had stated a gross falsehood to the House of Commons, to answer his own purposes; and to the said *Edward Lord Ellenborough* that he had unjustly convicted the plaintiff to make money of him, against the peace, &c."

The

The question intended to be raised on this special verdict for the opinion of the Court was, whether the facts stated in it, form a legal justification and defence against the action?

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Vaughan Serjt. for the Plaintiff. It may be admitted, that it might be expedient to vest in justices of the peace, the jurisdiction claimed by the Defendant, but, the question here is, whether that jurisdiction is established by law. If a justice of peace has power to issue warrants for apprehension and commitment in cases of libel, he must derive that power, either from the terms of his commission, or from the statute law, or from the rules of the old common law. "If this (says Lord *Camden* (a)) is law, it would be found in our books:" if it be not found there, it is not law. However expedient it may be, that such a power should exist, the Court will not decide on what is expedient, but what is law; and authority for the existence of such a power is not to be found in any of the sources before-mentioned. When a jurisdiction so destructive of the liberty of the subject has been assumed, the *onus* of proving the existence of it must rest entirely with the Defendant. In the first instance, the Plaintiff is called on to do little more than deny its existence.

Magistrates, in early times, were no more than conservators of the peace, as appears from stat. 1 *Edward* 3rd. (b). From that time to the 33rd. year of *Elizabeth*, their powers varied, and, soon after the 1st. of *Edward* 3rd., power was given to the justices to enquire of trespasses and felonies; about that time, too, they were warranted to arrest felons indicted (c). But, their original authority was only *ad pacem conservandam*, and,

(a) 2 *Wils.* 391.
 (b) c. 16.

(c) *Lambard. B. 1. c. 9. p. 46.*

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if it had extended further at common law, it would not have been necessary to enact the various statutes, by which, from time to time, that authority was increased.

The present form of the justice's commission was settled in *Michaelmas* term, 1590, when *Wray* was Chief Justice. That commission contains two branches: First, what the magistrates have power to do out of sessions: Secondly, what their jurisdiction extends to in sessions. At sessions, it must be admitted, that, under the term trespass, the magistrates have a jurisdiction over cases of libel, *Rex v. Rispal* (a), *Rex v. Summers* (b), though, in the latter case, *Hyde* C. J. thought otherwise: but, in the first branch of the commission, there is nothing that touches the present question; for, it only gives the justices authority to preserve the peace, and to execute all the statutes and ordinances of the realm relating to the peace. *Lambard*, in enumerating these, mentions "all statutes made for the repressing or punishment of force, violence, or fighting (c)," but, says nothing of any power to hold to bail or commit for any offence short of actual violence. The justice's power to apprehend, as given by the language of the commission, is confined to cases of actual breaches of the peace; but, it has been repeatedly laid down, that a libel is an offence, only on the ground of its *tendency* to produce a breach of the peace (d). No authority, then, is given by the commission in direct terms, none by necessary implication, and, it is impossible that such an authority can be intended. With respect to the statute law, if the legislature has any where conferred such a jurisdiction, all argument ceases, but, it is for the Defendant to point out when and where such jurisdiction is conferred.

The common law text writers come next, and their

(a) 1 *Bl. Rep.* 368. 3 *Burr.* 1320. (c) *Lambard.* 51.

(b) 1 *Lew.* 139.

(d) *Hicks's case*, *Hob.* 215.

authority

authority seems entirely subversive of any such doctrine. Lord *Coke*, who lived at the time, when the commission was settled, says, "We hold the resolution of the Court, viz. of *Brudnel, Pollard, Broke, and Fitzherbert*, in 14 *H. 8.* to be law, that a justice of peace could not make a warrant to take a man for felony, unless he be indicted thereof, and that must be done in open sessions of the peace (a)." His opinion has, indeed, been objected to by *Hale*, as "too strait laced," and also by *Hawkins*; but, if a judge is warranted in being strait laced in any matter, it is in that which concerns liberty of person. Lord *Coke*, however, founds his opinion on *Magna Charta*, "*Nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ*," and refers to the year-book, 14 *H. 8.* (b), to the language of former commissions, to the statutes 42 *Ed. 3. c. 3.* 1 & 2 *Ph. & M. c. 13.* and the 2 & 3 *Ph. & M. c. 10.* in proof of the illegality of a justice's granting a warrant upon mere surmises. If a justice had, at common law, the power of committing for these offences, he must, as incidental to such a power, have had also the power of examining; but, as the statute 1 *Ph. & M. c. 13.* expressly gives him the power of examining, it must be inferred, he had it not at common law. By the statute 2 & 3 *Ph. & M. c. 10.* the power of examining is extended to the cases of persons suspected of felony. The Plaintiff, however, is not driven to contend for so broad a proposition, as that a justice cannot issue a warrant for apprehension in any case before indictment found: it may be conceded that he can in treason, felony, and actual breaches of the peace; and, it is to be presumed, that Sir *M. Hale's* objection to the position laid down by Lord *Coke*, applies only

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(a) 4 *Inst.* 177.

(b) fol. 16. a.

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to cases of felony and treason, and does not extend to mere breaches of the peace, much less to what has only a tendency to a breach of the peace; for the chapter in which *Hale* makes the objection, is the chapter on felonies, and, in vol. 2. (a), he says "that a justice of peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted," but, the chapter contains no hint of any such power in the case of libels. In another passage, he considers it doubtful, whether a justice, out of sessions can issue a warrant to apprehend persons offending against a penal law (b). *Hawkins*, too, is of opinion, that, even in cases of felony, this jurisdiction was acquired silently and by connivance; "Inasmuch, as justices of peace claim this power rather by connivance than any express warrant of law, and, since the undue execution of it may prove so highly prejudicial to the reputation, as well as the liberty of the party, a justice of peace cannot well be too tender in his proceedings of this kind (c)." *Dalton* (d) cites the 5 *Eliz. c. 4.* as giving the justices authority to commit in certain cases; but, if they had it at common law, neither that statute nor 23 *Eliz. c. 10.* was necessary. The same observation applies to 48 *Geo. 3. c. 58. s. 1.* And, no statute has given the justices out of sessions, power to apprehend for misdemeanors, unless accompanied with an actual breach of the peace. If they have authority to apprehend for that, which has merely a tendency to a breach of the peace, they must also have it in every imaginable case of misdemeanor, a power which never can be established; as many misdemeanors are no other than mere trespasses. With regard to the decisions on this subject, there is no case which has established the justice's right to commit

(a) c. 13. p. 108.

(c) *Book 2. c. 13. s. 18.*(b) 2 *Hale P. C.* 113.

(d) c. 169.

in case of libel. In the *Queen v. Derby* (a), a secretary of state was allowed to commit for a libel against the government. How he acquired that power is unknown; it is said by a mandate of the crown; but, at all events, his jurisdiction, though perhaps too long established to be now shaken, furnishes no authority for the conduct of a justice. Even in the *Queen v. Derby*, they, who argued for the secretary of state contended, that the party was not committed, but merely kept in custody till he should answer: And *Parker C. J.*, by the very terms of his judgment, shews what was his opinion on the present question. He thinks the commitment by the secretary legal, and compares it, not to a commitment by a justice in case of libel, which, if such a power existed, would have been the obvious comparison, but, (as if he thought that was out of the question) to a commitment by justices in case of felony. In *Kendal's* case (b), the party was committed by the secretary of state, for assisting an escape; that case, therefore, does not touch the present question. In the case of the seven bishops (c), it was much disputed, whether the warrant could be legal, if not signed by the council board; from whence it seems to follow, that it would be deemed illegal, if issued by a single justice. But the case of *Rex v. Wilkes* is decisive of the present question. The Court in that case held, clearly, that libel was not a breach of the peace, and, that the Defendant was therefore entitled to be discharged. Lord *Camden*, (then C. J. *Pratt*), there said (d), "I cannot find, that a libeller is bound to find surety of the peace, in any book whatever, nor ever was, in any case, except one, viz. the case of the seven bishops, where three judges said, that surety of the peace was required in the case of a libel. Judge *Powell*, the only honest man of the four judges, dissent-

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(a) *Fortescue*, 140.(c) 4 *St. Tr.* 303.(b) 5 *Mod* 78.(d) 2 *Wils.* 161.

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ed, and, I am bold to be of his opinion, and to say that case is not law; but, it shows the miserable condition of the state at that time. Upon the whole, it is absurd to require surety of the peace, or bail in the case of a libeller." So that, without overruling that case directly, the court cannot give judgment for the Defendant on the present occasion. In *Entick v. Carrington* it is decided, that even a secretary of state cannot issue a warrant to apprehend a party for having libels in his possession (a). It is true, that, previously to the year 1762, justices had exercised this authority from the time of Queen Anne; but, mere usage of so recent a date, will not constitute law, and, especially, if that usage has grown up like the present, out of a number of unresisted cases, the mere yieldings of guilt or poverty, to power (b).

Bosanquet Serjt. for the Defendant. All the books concur, in stating a libel to be constituted by its tendency to produce a breach of the peace. It is an offence against the peace, though not an actual breach of it; and, for the purpose of giving the justices jurisdiction, it is immaterial whether it consist in a breach of the peace, or a tendency to produce such breach. It is not, however, necessary, for the Defendant to contend, that a justice is authorized to commit for a bare misdemeanor; it is sufficient to show, that he is justified in committing for this species of misdemeanor. And this appears clearly from the old authorities; all of them concur in calling it an offence against the peace. *Bracton*, in the chapter *de coronâ*, (a title not given to it without sufficient consideration) has this passage, "*Nunc autem dicendum est de minoribus et levioribus criminibus, que civiliter intentantur, sicut de actionibus injuriarum per-*

(a) 2 Wils. 292.

(b) See *Entick v. Carrington* *ibid.*
sonalibus

sonalibus, et pertinent ad coronam, eo quod aliquando sunt contra pacem Domini Regis: Videndum, igitur, quid sit injuria." "*Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum, et hujusmodi (a)."* In *Bacon's Abridgment*, Libel A., is a passage to the same effect. And Lord *Coke*, in the case *de libellis famosis (b)*, describes it thus; "Although the libel be made against one, yet it inciteth all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience. If it be against a magistrate or other public person, it is a greater offence; for that it concerneth not only the breach of the peace, but also the scandal of government." In all the modern books, the tendency to provoke a breach of the peace is always stated to be that, which constitutes a libel; in all the precedents, libel is stated to be *contra pacem*. It must, therefore, be taken, that libel is an offence against the peace, and if so, a justice is authorised to require sureties, and to commit for lack of them. A distinction, indeed, has been taken, between requiring sureties for good behaviour, and sureties for the peace; but, to appear in arms, even though without causing any actual affray, was held to be sufficient to cause a forfeiture of recognizances *de se bene gerendo (c)*.

There are four instances, in which the power to commit for libel has been questioned. The case of the Seven Bishops, of the *Queen v. Derby*, the *King v. Erbury (d)*, the *King v. Wilkes*: two of them turned on the privilege of the party committed, and two on the authority of the party committing. In the case of the

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(a) *Bract. de Coronâ. c. 36.*

(b) *5 Rep. 125.*

(c) *2 H. 7. fol. 253.*

(d) *8 Mod. 177.*

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seven bishops, which turned entirely on privilege, it was admitted all through the argument, that, if the parties had not been privileged, the arrest would have been legal. In *Wilkes's* case three objections were made: in neither of the two first did the counsel affect to say, that a common person could not be arrested, and the third point turns wholly on privilege. The strong expression attributed by *Wilson*, in that case, to Lord *Camden*, namely, "it is absurd to require surety of the peace or bail in the case of a libeller," is mitigated in another report of the case, to "*perhaps* it implies an absurdity;" and in the conclusion of this latter report are the following words, "upon the whole, though it should be admitted that sureties of the peace are requirable from Mr. *Wilkes*, still, his privilege of parliament will not be taken away till sureties have been demanded and refused;" which expressions are entirely omitted by Serjt. *Wilson*: and Judge *Powell*, in the Seven Bishops' case, did not dissent but abstained from giving any opinion (a). In the *Queen v. Derby* and the *King v. Erbury* the objection was made to the authority of the person committing, namely, the secretary of state, whose authority, it was urged, was more infirm, than that of a justice of peace, because he could not administer an oath. The reference made by the attorney-general there, to the case of a magistrate committing for felony, was only for the purpose of showing, that the party was merely detained in custody till he should answer, and not committed in the way of punishment. The power of committing is not, as it has been urged, limited to the cases in which a party can be called on to give sureties for the peace. An assault, though never so trifling, is a ground for committal; though, the offence being past, sureties for the peace

(a) 19 *Howell's State Tr.* 993.

cannot be required. A commitment may be made for many misdemeanours which are not a breach of the peace: as, for a conspiracy to levy war against the king. The opinion of Lord *Coke*, in the fourth institute has been denied to be law by *Hale* (a) and *Hawkins* (b), and said by *Hale* to rest on a hasty decision in the year-books. If then a libel afford a legal ground of arrest a justice of peace seems, by the very terms of his commission, to be the person properly authorised to carry that arrest into effect. Thus *Hawkins* (c), "there seems to be no doubt, but that a warrant may lawfully be granted by any justice of peace for treason, felony or *præmunire*, or any other offence against the peace." In this passage he refers to his 8th chapter, in which libel is expressly included as having a direct tendency to a breach of the peace (d). *Dalton* is an authority to the same effect (e), and after laying it down that the justices may bind to good behaviour, in four instances, which he enumerates, among which are "doing any thing which shall tend to the breach of the peace, or to put the people in dread or fear although there be no actual breach of the peace," concludes by saying, of these four matters, "yea, they are breaches of the peace (f)." In c. 124, he says again, "libellers may be bound as disturbers of the peace:" c. 170, is to the same effect. The usage in the present case is not indeed that which constitutes the law; but may be considered as confirmatory of it in an eminent degree. By the return to the House of Lords (g) it appears that from the 6th of April 1704 to the year 1763, there have been

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(a) 1 *Hale* P.C. 579.(b) *Hawks*. P. C. c. 13. s. 11. Book 2.

(c) c. 13. s. 15. Book 2.

(d) c. 8. s. 38. Book 2.

(e) c. 123. p. 287. See also c. 170. and c. 6.

(f) c. 123.

(g) See "an account of persons held to bail to answer in the court of King's Bench for libels, from 1st *Anne* to 57th *Geo.* 3. both inclusive." Ordered to be printed, 3d March, 1818.

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no less than 123 commitments for libels of various kinds, and no search was made beyond the year 1704. From the year 1763 indeed to the 41st of Geo. 3. the practice seems to have ceased, and that cessation is what has caused the present doubt; there having been but five commitments in that reign, two in 1763, and three subsequently, beginning with the 41st year of that reign. The argument drawn from statutory enactments and especially those of the 48th Geo. 3. is not founded in fact; for the earlier statutes, as those of *Philip & Mary*, do not increase but abridge the power which the justices had been in the habit of exercising. And the 48th of Geo. 3. is confined to the Judge of the court of *King's Bench*, who by that statute may, when any person is charged with the offence (not being treason or felony) for which he may be prosecuted by indictment or information in that court, upon affidavit thereof or certificate of indictment being filed, issue their warrant to apprehend the party; who shall be thereupon held to bail to answer the charge, or, on failure of bail, shall be committed.

Vaughan Serjt. in reply. The proposition that a libel is tantamount to a breach of the peace, because alleged in indictments to be *contra pacem*, is too general. Every species of offence, whether attended with an actual breach of peace or not, is alleged in indictments to be *contra pacem*; as many civil injuries unattended by actual force are stated to have happened *vi et armis*. So the civilians use the terms *vim simplicem* and *vim atrocem*. *Lambard* has a passage explanatory of the same doctrine (a). As little applicable is the authority of *Bracton*, who, in the chapter cited, speaks *de minoribus et levioribus criminibus, quæ civiliter intentantur*; thereby

(a) p. 134.

evidently

evidently designing to speak rather of injuries for which the remedy is by action, than of offences criminally punishable. The case in 2 H. 7. (a) only decides what shall be the meaning of an engagement *de bene gerendo*; and certainly a recognisance for good behaviour may be forfeited by many acts short of an actual breach of the peace. The decision in the year-book 14 H. 8., on which Lord *Coke* founds the opinion in his fourth institute, was not a hasty decision, but was long considered, argued three days, and incorporated into the abridgements, especially by *Broke*, who was one of the judges presiding at the determination of the case. Then as to the later decisions. It was never hinted in the *Seven Bishops'* case, that any could commit for libel except one of the council; and the commitment in the *Queen v. Derby*, being by a secretary of state, does not apply to a justice of peace. As to the discordant reports of the *King v. Wilkes*, it must be taken, that Serjt. *Wilson* is higher authority than an anonymous reporter: but, at all events, though the expressions of one report are stronger than those of the other, the two are by no means inconsistent; and the absence of any commitments for thirty-seven years after that decision, is a strong proof that it was considered as decisive of the question now before the Court. If the jurisdiction slept during all that time, and the state, as it appears, experienced no ill consequences from the remission, why should it now be revived, or the natural tendency of power to increase itself, be again so materially assisted?

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DALLAS C. J. Whatever may be the opinion of the Court in the result of this case, I agree with my brother *Vaughan*, that it is a question of considerable magnitude, involving, no doubt, the essential interests of the public;

(a) fol. 2.

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on the one hand affecting the liberty of the subject, and, on the other, those powers with which magistrates are or ought to be invested, for the maintenance of order and public peace. I, for one, am extremely happy that it has undergone the thorough investigation, and the able discussion which have been bestowed on it.

On the trial of the cause, I myself felt no difficulty, nor entertained any doubt whatever. I stated to the jury, plainly and broadly, my opinion, that, in point of law, the magistrate had the power which he had exercised; that, in point of duty, he was bound to exercise it; that it would have been a culpable dereliction of his duty, if he had not acted as he did; and, therefore, that the Defendant was entitled to their verdict. The jury, however, did not think fit to adopt the law as laid down by me, but, after withdrawing for a considerable time, they returned, and informed me by their foreman, that they could not subscribe to my statement of the law, and, therefore, wished to find a special verdict, in order that the question of law might be submitted to the consideration of the Court: — that has accordingly been done, and we have now heard the verdict in question, fully argued upon both sides.

It is admitted in the outset, that the libel in question is one of the worst possible description; and, (if that could make any distinction) if it be not actually a seditious libel, it is admitted to border upon a libel of that nature. Most undoubtedly the libel in question is one of the worst description; I need not refer to its nature, or to the situation of the parties, against whom it is directed, or to the public duties, which they have to exercise in their respective situations, or to the interests which the public have in the honorable and upright exercise of those duties; for it is admitted again, and correctly admitted, that, whether it be a libel of one description or another, a seditious libel, or a scandalous

libel, or an infamous, or a blasphemous libel, or an obscene libel, or a mere libel upon a private individual, the question in every one of those cases, as far as it concerns the exercise of the authority in question, is identically the same, coming round to this, — has or has not a magistrate, being a justice of the peace, a right to commit a party brought before him, charged on oath with the publication of a libel, if he cannot find sureties to appear to answer to an indictment?

With respect to the power in question, it has also been fairly admitted, that, if magistrates have not such a power, it is expedient that they should have it; but, to that my brother *Vaughan* has correctly added, that this is not a question, whether it is expedient that they should have such a power, but, whether, in point of law, the power does actually exist; for, that we are not to make the law, but to expound or declare it as we find it.

How, then, is it in point of law; and, first, what has been the usage? — Not that I mean to say, that mere usage in every case will constitute law; but, it is a primary and fundamental principle, that usage is of great weight in shewing what the law is, or in expounding the law, if it be doubtful; and, therefore, in every case, in the natural and simple order and progress of enquiry, we first turn to the books or the precedents to see, whether, in point of fact, the power which is in controversy, has been exercised or not.

Now, upon this, we have a bulk of evidence, such as I will venture to state was never produced in a Court of justice upon any occasion before, for the purpose of being applied to cases of this description, or of any description whatever; a series of instances brought forward in consequence of a solemn enquiry, (the result of a search of the files of the records of the courts of justice

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tice in this country), presenting no fewer than 128 cases of persons actually bailed on a commitment similar to that in question, extending from time to time, and scattered over a period of nearly 120 years, as far back as the enquiry has gone, from the first year of the reign of queen *Anne*, down to the 57th of His late Majesty. Nor are those all the instances, in which there has been an exercise of this power; for the return made, is confined to the instances of persons, from whom bail actually was taken; but, when we consider what description of persons libellers in general are likely to be, we may and must conclude, that an infinitely greater number, whose cases do not appear before the Court, have been committed, in the first instance, for want of bail: and, though the enquiry goes no further than the beginning of the reign of queen *Anne*, the reason for that is explained; for, the enquiry being directed to go back to the time of the Revolution, or the year 1689, was not proceeded in so far back, because searching records so remote, might have been attended with difficulty. There are innumerable instances of persons committed in cases not so culpable as libel; there are innumerable instances of persons committed for want of bail for seditious words. Then I should be of opinion, if the case rested here, if nothing were to be found in the books on the subject, if there were nothing but an uniform practice, without being resisted in any one instance for nearly 120 years, that, under the circumstances attending such usage, such usage alone would constitute a footing and a foundation so firm for any law to stand upon, that he must be a bold man indeed, — I will venture to say a presumptuous man, — who, against the exercise of such a power by such persons, would venture to declare law built upon such a foundation, not to be law at this day. For, let it be remembered, in a great

number of cases, the individuals were actually taken before the Court of King's Bench upon *Habeas Corpus*, (the warrant of commitment, stating the nature of that commitment) and actually remanded: so that it is not merely an exercise of such a power by a justice of the peace; it is not a practice which has obtained and prevailed and grown up in silence and obscurity, — creeping on, if I may so express it, in a dark subterraneous passage, — but, it is a practice going on from day to day, under the eye of those eminent and illustrious persons, who have filled the highest seats in the highest Court of Criminal Jurisprudence in this country: it has received their sanction; nor is there to be found in the books, (with the exception of a single solitary saying, on which I may say something by and by), a saying, or a statute, or any thing, which can be introduced, to attack the validity of this usage, which has prevailed such a length of time.

But, it is said, it goes no further back than the Revolution; to that I do not agree, but, I will take it to be so for the moment. I own it is an objection of a singular nature, when an enquiry is to be made into the powers of the magistrates, when the question is touching the liberty of the subject, that such enquiry goes no further back than the Revolution. It was directed, that the enquiry should go no further back than the Revolution, in order that precedents might not be produced of a doubtful nature, that recourse might not be had to former times for the purpose of establishing a tyrannous and arbitrary exercise of power. But, still I agree with my brother *Vaughan*, plainly and broadly, that, if the practice had its commencement with the Revolution, if it can be shewn then to have originated for the first time, if there is no trace of the time of its origin in the statute law, none in the common law, none in

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in the sayings of judges, from time to time, or in the decisions of courts, — I would not hold a usage of such a continuance to be law. If the practice were against the first principles of constitutional law, and an evident encroachment upon the right of the subject; — I would even go the length of saying, if it were of the description which I have stated, and were sanctioned by the expressions of one of the judges, in such a case as this — I would not hold it to be law, if it had existed from the foundation of *Rome*. The question, therefore, comes round to this, — whether this be a usage contrary to the fundamental principles of law?

Now it has been said, that, if it be law, it will be found in the books, and, if it be not law, it will not be found in the books. That is a doctrine, to which I cannot agree; that is one of those many sentences, in which the simplicity and solidity of truth are sacrificed to hypothesis and point. Law may exist and may not be found in the books; for, that may be law, which, in point of principle, is so clear, that it never occurred to any man to question it, till a case come to draw it into doubt; and, therefore, silence upon the exercise of a power is evidence, that it is legally founded, whether we find any thing relating to it in the books or not.

But, still, I am willing to try the legality of this usage by the text, to which I am invited; and that is, whether there is or is not any thing to be found, respecting the validity or invalidity of this usage in the books? It is said, it is not to be found in the statute law, nor in the common law, nor in the commission of the peace, nor in any adjudged case which has been produced; and we have been referred to a great number of cases, for the purpose of disproving the existence of such a power. There are some of them, which, as they appear to me,

to have no application whatever to the present subject, except as I shall point out, I will endeavour to dispose of in the first instance; and the first of these is the case of the Seven Bishops. Now how to apply that case, in the way in which my Brother *Vaughan* seems to connect it with this subject, I am utterly at a loss. That case was ultimately decided, upon the ground of privilege of parliament. Seven bishops, being peers of parliament, had, it was contended, privilege, except in cases of actual breach of the peace; and it was contended, that a libel had only a tendency to a breach of the peace, and was not an actual breach of the peace. With respect to the decision in that case, in which there is much to blame, and, in my judgment, very little to applaud, I say nothing: but the case itself went plainly upon the ground of distinction between those who have privilege of parliament and those who have not; and, therefore, the case itself is, to me, pregnant with this inference, that, if it had been a case, not of persons having privilege of parliament, but of persons similar to this Plaintiff, not having such privilege, then, even on the ground on which that decision stood, and on the principle on which the whole argument proceeded, they would not have been entitled to be discharged. In principle, therefore, the case does not apply; but the very distinction, which makes it differ in point of fact, leads, irresistibly, to the inference, that, if they who have privilege of parliament are entitled, merely because they have such privilege, to be discharged; those who have no such privilege, have no such right whatever. Therefore it appears to me an authority the other way.

What is the next case? That of a secretary of state. It is agreed that he has power to commit in the case of libel; that has, however, been at different times denied; and it is a little extraordinary, to see the ground on which it has been disputed. It is on this ground,

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that a secretary of state is not a justice of the peace, it being taken, throughout the argument, as far as we can collect any thing negatively from the case, that he would have had a power to commit, if he had been a justice of the peace; but not being so, he had no such power; thereby admitting, that justices of the peace have such a power. Then as to *Wilkes's* case, which is of a very singular description, that was a case of privilege of parliament. When we recollect the temper of the times, and the political character of the individual who was contesting the rights of the people against every constituted right of the kingdom, can we suppose that he would have placed his resistance to the power which had committed him, on the basis of privilege of parliament? — That he would not have stood on the broad ground of a subject's right, insisting that magistrates had not a power to commit in a case of libel, — that offence not being a breach of the peace, but only having a tendency to a breach of the peace, — if he had conceived that his right, as a *British* subject, had been invaded by the attempt? His case, therefore, becomes extremely strong, in my judgment, to show, that, not only in his opinion, but in the opinion of the able persons by whom he was advised, it was impossible to rest his cause on the ground that he was a subject of the country, and that magistrates had not a power to commit in a case of libel. So much with respect to those cases, which, it seems to me, are not similar to the present, but are pregnant with inferences in favour of the power now claimed.

I come next to that which has a more immediate reference and a closer application to the subject. It is said, that in the statute law, in the commission of the peace, in the fitness and reason of the thing, — that, in the first and fundamental principles of the constitution, and that, in decided cases in courts of justice, there

there is no trace to be found of any authority or warrant for the exercise of such a power.

First, then, with respect to the fitness of the thing. It is a most extraordinary proposition to state, that a magistrate shall be invested with a power to bind over any person to appear to answer to an indictment found for a common assault, for holding up a stick in a threatening posture, or giving a blow to an individual, because it is an actual breach of the peace: but that where an offence of an infinitely worse description has been committed, where a libel, stirring up all the people of the country to riot and bloodshed, has been published, he is invested with no such power. There is not much of reason or fitness in such a distinction; but I admit, if the law be settled in disfavour of such a power, this would only go to show the necessity for giving such a power in future.

What is the law, then, upon the subject. First, to refer to the statutes — the earliest statute to be found, is one of the statutes which has been referred to, the 1st *Edw. 3.*, the language of which is, that justices “shall be assigned to keep the peace;” and so is the language of every subsequent statute. The language of their commission gives them jurisdiction over trespass, and a trespass, in strictness, is a breach of the peace: but the statute operates in the creation of magistrates for the due maintenance of the peace: and we find, not only in the reason of the thing, but in all the books, beginning with the earliest authorities, that a libel is an offence against the peace, because it has a tendency to a breach of the peace; and, therefore, upon the reason of this position, and the reasonable exposition of the general words of the statutes, I should say, that an act, which is for the preservation of the peace, (and binding a libeller over is such an act, because a libel has a tendency to a

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breach of the peace) falls within the powers conferred upon justices.

We are told that we must look to the authorities, and find what we can in the books upon the subject. Now if the authority of Lord *Hale*, and that of Mr. Serjeant *Hawkins*, are to be treated lightly, we may be without any authority whatever. With respect to Lord *Hale*, it is needless to remind those whom I am now addressing, of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him, was not known by any other person who preceded or followed him; and, that what he knew, he knew better than any other person who preceded or followed him. With respect to Mr. Serjeant *Hawkins*, we know his authority. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort. I must, therefore, look to these books; and I shall proceed to examine the exposition given by text writers of the words of those statutes, and the commission of the peace.

Let us examine what is said on this subject by Mr. Serjeant *Hawkins* (a): "As to the 8th point, viz. what authority justices of peace have in relation to inferior offences, it would be endless to enumerate all the offences within their jurisdiction, concerning which there have been such great numbers of statutes; and, therefore, I shall content myself in this place with observing, that by the above-mentioned statutes of the 34 *Edw. 3. c. 1.*, and also by the express words of their commission," — here, then, we have under our consideration the express words of the statute, and of the commission: — "they are empowered to hear and determine all trespasses, which is a word of very general extent, and in a large

(a) *Bl. 2. c. 3. s. 33.*

sense not only comprehends all inferior offences, which are properly and directly against the peace, as assaults and batteries, and such like, but also all others which are so only by construction." Distinguishing, therefore, between that which is an actual breach of the peace, and that which is by construction a breach of the peace; and going directly, as I shall presently show, to the case of libel, which is to be taken, not as an actual breach of the peace, but a constructive breach of the peace, as having a tendency to break the peace. "Yet it hath been of late settled, that justices of peace have no jurisdiction over forgery or perjury at the common law; the principal reason of which resolution, as I apprehend, was, that, inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass,' in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or, at the most, to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like." The word 'trespass,' then, according to Mr. Serjeant *Hawkins*, and the authorities which are referred to in the margin of his book, does not imply, (so as to be narrowed and confined to them,) cases which are actual breaches of the peace: but trespass, in its largest signification, extends to all cases which are against the peace; and, it is admitted at the bar, that, whether a libel be an actual breach of the peace or not, it is an offence against the peace. In the words, therefore, of the statutes and the commission itself, the word 'trespass' has this large signification belonging to it, so as to involve most undoubtedly the case of libel. Now, what is a magistrate to do in a case of this description? The Plaintiff was brought by

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a warrant before the magistrate, the charge was established upon oath, and information regularly given; and, therefore, upon that, the offence charged being, as I have stated, within the jurisdiction of the magistrate, he was bound, in the first instance, upon the footing of such information, to grant a warrant. Now, let us see what is the effect and operation of the warrant in cases similar to the present. "Arrests by the command of justices of peace, as such, are either by parol or by warrant. And first, as to such arrests by parol, it seems, that any such justice may lawfully, by word of mouth, authorise any one to arrest another, who shall be guilty of any actual breach of the peace in his presence, or shall be engaged in a riot in his absence. As to such arrests by the warrant of a justice of peace, I shall endeavour to show in what cases a warrant for such an arrest may lawfully be made by such a justice, in what form it ought to be made, and how it is to be executed. As to the first point, I shall consider for what offences such a warrant may be granted, and upon what evidence. And first, as to the offences for which such a warrant may be granted, there seems to me no doubt but that it may be lawfully granted by any justice of peace for treason, felony, or *præmunire*, or any other offence against the peace (a)." This alone seems to me decisive of the present question. If this be law, the magistrate having jurisdiction over a libel as an offence against the peace, and being bound to grant his warrant to apprehend the person charged with such an offence, the warrant was in the first instance legally granted. What, then, was the magistrate to do? Was he to grant a warrant merely to bring the offender before him in order to discharge him when he arrived? And what can a magistrate do but discharge the offender when

(a) *Hawk P. C. Bk. 2. c. 13. s. 14, 15.*

he is so brought before him, unless he commit him, upon default of his finding sureties, in order that he might appear to an indictment? When it is admitted throughout the argument, as it must be, that a libel is an offence against the peace, and that the magistrate was bound to issue his warrant on information on oath, it appears to me, that when the party was brought before him, the magistrate was bound to commit him, unless he found proper sureties; otherwise the warrant would be to be granted merely to discharge the party. It seems to me, therefore, in this view of the case, that there could be no doubt of the legality of the warrant or the power of the magistrate. But it is said (a), "That anciently no one justice of peace could legally make out a warrant for an offence against a penal statute, or other misdemeanour cognisable only by a sessions of two or more justices; for that one single justice of peace has no jurisdiction of such offence, and, regularly, those only who have jurisdiction over a cause can award process concerning it. Yet the long, constant, universal, and uncontrolled practice of justices of peace seems to have altered the law in this particular, and to have given them an authority in relation to such arrests not now to be disputed." And then, in a subsequent part of the same chapter (b), the writer adds, "As to the evidence on which such a warrant is to be granted, it seems probable, that the practice of justices of peace, in relation to this matter also, is now become a law, and that any justice of peace may justify the granting of a warrant for the arrest of any person, on strong grounds of suspicion, for a felony or other misdemeanour, before any indictment has been found against him." It is quite clear, then, according to the authority of Mr. Serjeant *Hawkins*, that whether an indictment be found against the party

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(a) *Hawk. P. C. Bk. 2. c. 13. s. 16.* (b) *s. 18.*

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or not, if the offence charged be an offence against the peace (over which the magistrate has jurisdiction), he has power to grant a warrant against the party offending, and to commit him for trial. This seems a direct authority, unless we are to reject the authority of the writer.

But, following the same course, the next authority to which I shall refer is my Lord *Hale*, and the passage in question is this, "Justices of peace may also issue their warrants, within the precincts of their commission, for apprehending persons charged of crimes within the cognisance of the sessions of the peace; and bind them over to appear at the sessions, and this though the offender be not yet indicted (a)." Here, then, is the authority of Sir *Matthew Hale*, directly in point to the present purpose. Now, let us see how my Brother *Vaughan* endeavours to get rid of it. It is said that the writer is treating of felonies: so undoubtedly he is, but he is treating of felonies in legal language; and, in the course of that treatise of felonies, he is speaking incidentally also of general jurisdiction, and the jurisdiction of justices of the peace; and, therefore, in describing the jurisdiction of justices of the peace, he says, that they have a right to issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within the cognisance of the sessions of the peace. It is not to be disputed, that every libel is within the cognisance of a justice of peace. A justice of peace, then, has cognisance at the sessions of the peace over a case of this sort; and, according to Sir *Matthew Hale*, he has such cognisance, not merely in sessions, but also before indictment found.

But, it is said, the word to be found in this passage is the word *crimes*. Now, in point of law, there is no dis-

(a) 1 *Hale*, P. C. 579.

tion between crimes and misdemeanors; there may be in popular signification; and there undoubtedly is; but it is only necessary to look into the very first pages of the 4th volume of *Blackstone*, where the very doctrine which I now state will be found. His words are, "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms: though, in common usage, the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the general names of misdemeanors only (a)." When I find Sir *Matthew Hale* describing the jurisdiction of justices of the peace, not merely in discussing any particular offence, but meaning to describe as largely as possible that jurisdiction, I take him to use the most extensive word *crimes*, that word being synonymous with *misdemeanors*. But not only in this passage, but in every other on the subject, his opinion was, that justices of the peace have the power to commit before indictment found, in all cases within the cognisance of the sessions.

But the authority of Lord *Coke* has been mentioned, who is, upon cases of this sort, I will not say to be altogether disregarded, but certainly to be dissented from: it is so said most expressly by Sir *Matthew Hale* (b), upon the very occasion. "And therefore," he adds, "the opinion of my Lord *Coke*, 4 *Inst.* 177., is too strait-laced in this case, and if it should be received, would obstruct the peace and good order of the kingdom." But my Brother *Vaughan* has observed; that the words of Lord *Hale* are, "And the book of 14 *H. 8.* p. 16.,

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(a) 4 *Bl. Com.* 5.(b) 1 *Hale*, P. C. 579.

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upon which he grounded his opinion, was no solemn resolution, but a *sudden and extra-judicial opinion*; and the Defendant had liberty to amend his plea, as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done." Now, let it be attended to, that whether Lord *Hale* was right or wrong in this statement (but I take him to be clearly right), it would make no difference whatever, because it would go to that point merely; for it is agreed, that on an actual breach of the peace, every justice of peace has not only the power to commit, but is bound to commit a party, in order that he may appear to an indictment, when found: and yet the doctrine of Lord *Coke* goes to this, that no man ought to be committed for felony or misdemeanor before indictment found. The whole of the doctrine, therefore, of Lord *Coke* is inconsistent with the power of magistrates to commit in some cases, Lord *Coke* being of opinion that they cannot commit in any case before indictment found. It appears, therefore, to me, upon the authority of Lord *Hale*, and from the passages which I have read from Mr. Serjeant *Hawkins*, that there can be no doubt that the offence is within the jurisdiction of justices of the peace: the offence being within their jurisdiction, they are empowered and bound to bring parties charged with it before them; and it follows of necessity, that in default of sureties, they are bound to commit.

Now, let us see what will be found in Mr. Justice *Blackstone*. In the 4th book of *Commentaries* there is a chapter (a), of which the title is distinctly this, "Of offences against the public peace;" and after specifying some, he goes on to state (b), "Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination."

(a) *Cb.* 11.(b) *S.* 12. p. 150.

ation :” and then (a) he puts the case of libels, of which he says, “the direct tendency is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.” There are a great number of cases, into which I will not enter, where it is laid down in the arguments at the bar, and in the decisions of Judges, that a libel is an offence against the peace.

It seems, therefore, to me, that, if this were an usage against all reason and principle, and inconsistent with the essential and fundamental rights of the subject, it need only be brought forward in a court of justice, to receive the reprobation which it would deserve: but when I refer to all the arguments, the fitness of the thing, the words of the commission of the peace, and the words of the statutes, aided by the luminous exposition of the most learned writers on the subject, followed by the universal practice of courts of justice for 120 years, without a single decision denying its existence, without a single *dictum*, save that which was extrajudicial and applied to a different subject, — can one hesitate for a moment in saying, that, if in any case, by principle, by decision, or by practice, the law can be settled as clearly founded and established, it is so in this case? It is my opinion, that it is so settled beyond all doubt. I rejoice that it is so settled, both for the credit of our courts in times past, and for the maintenance of peace and good order in time to come.

PARK J. This has been stated, both from the bench and at the bar, to be a case of great importance, and therefore, it is probably expected, that each Judge should give his own opinion. Were it otherwise, I should have thought it my duty to repose myself under the very luminous declaration of the judgment of the

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Court, which has been pronounced by the Lord Chief Justice. Indeed I fear, (and I say this most sincerely and unfeignedly) that by putting my decision into language, I shall weaken that which has been already so ably delivered. The question has been argued with much ability at the bar on both sides; and I, for one, beg to express my very cordial thanks for the manner in which it has been discussed by my two learned Brothers: for, if any thing shall be overlooked, the fault will not be attributable to them; they have furnished us with all the materials. The question may be of importance, but I think there is no difficulty in it, whether we refer to text writers, to ancient precedents, to the commissions of the peace, or to uniform practice on the subject.

To begin with the statutes, which authorise commissions of the peace, and the words of which statutes those commissions adopt. My Brother *Vaughan* referred to many of the ancient statutes, but he has passed by the statute of 34 *Edw. 3. c. 1.*, which was supposed to be the foundation of the commission, though it was formed, as it now appears, in the reign of Queen *Elizabeth*. By that statute, justices of the peace “shall have power to restrain offenders; rioters, and all other barrators, and to pursue, *arrest*, take, and chastise them, according to their trespass or offence;” — these are most general words; — “and to cause them to be *imprisoned* and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best to do, by their discretions and good advisement.” And in another place in the same statute, it is said, that justices are to “take and *arrest* all those that they may find, by indictment or by *suspicion*,” — which last expression must allude to time anterior to indictment, — “and to put *them in prison*, and to take of all them that be not of good

fame, where they shall be found sufficient surety and mainprize towards the king and his people." It appears to me, that this statute requires justices of peace to take and arrest offenders: and if they take and arrest them, and such offenders do not give bail, are they to set them at large, to repeat their offences?

That these words of the statute were thought sufficient for the purpose of comprehending libels and of enabling the justices to act by taking bail, seems to be quite evident from what is to be found in our best writers upon this subject. First of all, is a libel a breach of the peace, has it a tendency to a breach of the peace, and is it indictable at the sessions? Hear *Bracton*, *Dalton*, and Serjeant *Hawkins*, on that subject; for I do not think the passage mentioned by my Brother *Bosanquet*, from the first named author, unworthy of attention: *Bracton* (a) says, "*Fit autem injuria non solum cum quis pugno percussus fuerit, vulneratus, verberatus, vel fustibus cæsus; verum, cum ei convitium dictum fuerit, vel de eo factum carmen famosum et hujusmodi.*" This shows, that, even in those early days, a libel, or even reproachful words, were, if we judge from the association in this passage, deemed offences against individuals. That I may not occupy too much of the time of the Court, I think it sufficient to refer to chapters 123, 124. and 170. of *Dalton*, where much valuable learning, all concurring in the present opinion of the Court, is to be found. That the matter of libel is cognisable at sessions, is quite clear from what is stated in *Hawkins* (b), and the whole section, which has been referred to by my Lord, is most material. If, then, this is a matter cognisable before justices of the peace in their sessions, the question is, may a person, before indictment against him, be held to bail or committed? What says Lord

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(a) *Lib.* 3. c. 36.

(b) *Bk.* 2. c. 8. s. 38.

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Hale upon the point? "Justices of peace may also issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within the cognisance of the sessions of the peace, and bind them over to appear at the sessions, and this though the offender be not yet indicted (a)." But this, it has been said, refers only to felonies, because the title of the chapter relates to felonies only. The reason why I do not think so is this, that Lord *Hale*, in the preceding paragraph (b) to that which I have quoted, says, "Justices of *oyer* and *terminer* may also issue their warrants in the counties within their commission for apprehending felons or other malefactors, or for surety of the peace within their limits." There he is speaking of felonies; and then comes the paragraph which I first read; "Justices of peace may *also* issue their warrants, &c." showing, that, for any crimes which are within the cognisance of the sessions, they may issue their warrant, though no indictment be found; and though he be speaking of felonies, he is also, throughout the chapter, speaking of the general power of different courts and magistrates, as the Court of King's Bench, justices of *oyer* and *terminer*, and justices of the peace. But, on this point, we have Lord *Coke* set up against Lord *Hale*; and it is admitted, that Lord *Coke*'s authority fails in this respect upon the point of felony altogether; This, surely, weakens the general effect of his argument. But he cannot be supported, for the case which he quotes (c), does not maintain his position, being, as Lord *Hale* states, a sudden and extrajudicial opinion; and, because the statutes which he quotes, namely, 1 *P. & M. c. 13.* and 2 *P. & M. c. 10.*, directly contravene his opinion. For it is most curious to observe,

(a) 1 *Hale*, P. C. 579.(c) *Year Book*, 14 H. 8. 16. a.(b) *Ibid.*

that

that those statutes were intended to restrain rather than to enlarge the power of the justices in the article of bailing in the points to which they relate; and therefore, I agree with Lord *Hale*, when he says (a), "The opinion of my Lord *Coke*, 4 *Inst.* 177. is too strait-laced in this case; and if it should be received, would obstruct the peace and good order of the kingdom. The book of 14 *H.* 8. c. 16., upon which he grounded his opinion, was no solemn resolution, but a sudden and extra-judicial opinion, and the defendant had liberty to mend his plea, as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done; and the constant practice hath obtained, contrary to that opinion." Indeed, I would go further than Lord *Hale*, and say, not only that Lord *Coke* is too strait-laced, but that his opinion is quite erroneous, unsupported, nay, contradicted by the authorities which he quotes, and that, by attempting to prove too much, he proves nothing. I think the reasoning of Lord *Hale* on the subject most admirable, and I will take the liberty of repeating it to the Court. He says (b), "And whereas my Lord *Coke* saith also, that a justice of peace, upon oath made by *A.*, of a felony committed, and that *A.* suspects *B.*, and shows his cause, cannot issue a warrant to bring *B.* before him for farther examination, and thereupon commit or bind him over to the assizes or sessions, because it must be the proper suspicion of *A.* himself, and *A.* may arrest him upon the force of his own suspicion, but not by the warrant of the justice; I think the law is not so, and the constant practice in all places hath obtained against it; and it would be pernicious to the kingdom if it should be as he delivers it; for malefactors would escape

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(a) 1 *Hale*, P. C. 579. 3d par.(b) 2 *Hale*, P. C. 579.

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unexamined and undiscovered; for a man may have a probable, and strong presumption of the guilt of a person whom yet he cannot positively swear to be guilty."

What then are the cases upon the subject? In the *Queen v. Derby (a)*, the Defendant had been apprehended, by warrant of the secretary of state, for a libel. The main question there, and also in the case of *The Queen v. Kendal*, was, whether a secretary of state could commit for a libel? What was the judgment of the Court of King's Bench in the former case? Lord Chief Justice *Parker* said "The defendant cannot be discharged; the warrant is good and legal." Mr. Justice *Eggs* said, "A secretary of state has power to issue a warrant," — (nobody seems to have doubted, that a justice of peace might;) — "it was so held in the case of *The Queen v. Kendal*, and settled in Queen *Elizabeth's* time." And again, "publishing a libel is a crime well known in our law." In *Rex v. Erbury (b)*, Defendant, as author of a libel, was arrested by a warrant from the secretary of state, and bailed to appear in the Court of King's Bench, in the reign of Geo. 1. The chief question turned upon the outlawry, but nobody questioned the propriety of his being obliged to give bail. In the trial of the Seven Bishops, it is quite clear, that the only question was, whether the privilege of peerage, or rather the privilege of the House of Lords, rendered it unnecessary, that the supposed offenders should be held to bail; but nobody seems to have doubted, that a libel was an offence for which bail might be required. Mr. Justice *Powell* did not dissent from his brethren on that occasion, but only wished to have time to look into the point; and I think, because time was not given, (which was not necessary, the three other Judges being of opinion, that

(a) *Fort.* 140.

(b) 8 *Mod.* 177.

the Bishops were notailable) a denunciation of dishonesty against men, who, from no other part of their lives, nor from any thing appearing in the particular case, deserved such a stigma, is too harsh a sentiment to proceed from the sacred seat of justice. In *Wilkes's* case (a) it is most manifest, that the case proceeded upon the breach of privilege only; for the two first objections would have applied to the case of any individual, as well as to a member of either house of parliament, and they were both over-ruled by the Court: and Lord Chief Justice *Pratt* concluded his argument on the second point, by saying, "it is said to be an infamous and seditious libel, &c. it is such a misdemeanor as we should require good bail for, and such as the party may be able to procure." His Lordship, therefore, though much of his reasoning in the observations which he made upon the point of privilege of parliament goes that length, does not seem to have drawn his brethren (and we know that they were as honest men as ever sat in *Westminster Hall*) into the idea, that libel was not a crime for which a person could not be held to bail, unless he were protected from it by privilege of parliament. Another reason for so concluding is this; if it had been the opinion of the Court, upon the general point, that a man could not be arrested, or held to bail for a libel, is it to be supposed, constituted as the Court then was, that the great question, so palatable at that time to a part of the nation, would have been avoided, and the decision allowed to turn upon a strict narrow ground, which was only applicable to few persons? In *Hargrave's State Trials*, there is, as it seems to me, a better report of *Wilkes's* case, than that in *Wilson*, if the two reports are set up against each other. My reason for pre-

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(a) 2 *Wils.* 151.

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ferring the former is, that wherever I find a reporter lending himself to the politics of the litigant party, and using unbecoming language, I receive every thing which he says with great suspicion. But if there were any doubt upon this point, what has been the uniform practice? Here are no less than thirty-four instances in the reign of Queen *Anne*, of such arrests; thirty-six in that of *George I.*; fifty-three in the reign of *George II.*; and, strange to say, only five from the first to the forty-ninth year of *George III.*: and I own I think it probable, that the paucity of cases in the reign of *George III.* has led to the notion, among considerable persons, that the course pursued in this case was unwarranted by law. At least, it proves this, (whatever those, who do not deeply look into the transaction of things may suppose,) that, during the reign of our late excellent Sovereign, criminal justice never was administered with a more light and lenient hand; and, that the liberty of the subject never was more religiously observed.

But my brother *Vaughan* has said, that these instances ought not to be too deeply appreciated, because nobody questioned the decision. Unfortunately for that argument, these were not cases of commitment by justices to sessions, but to answer in the Court of King's Bench; and can it be presumed, that Lord *Holt*, Lord C. J. *Parker*, Lord C. J. *Pratt*, Lord *Raymond*, and Lord *Hardwicke*, in whose presidencies most of these commitments are, with the learned Judges who assisted them, were inattentive to the liberties of the subject? But the case does not depend upon the reasoning, because the coroner and attorney of the Court of King's Bench has reported to the House of Lords, that many cases, besides those included in the returns, were discussed upon *habeas corpus*, where the parties were not admitted to bail, upon libels before indictment

dictment found; so that these cases had, of course, received the attention of the Court. Besides which, the same officer reports, that many persons, only charged with *speaking* seditious words, against whom informations and indictments had been afterwards prosecuted, had been under recognizance to appear. I, therefore, agree with Lord *Hale*, that justices of the peace have a right to issue their warrants within the precincts of their commission, for apprehending persons charged of crimes within their cognizance, at the sessions of the peace, and to bind them over to appear at the sessions, and this though the offender be not yet indicted. I am of opinion, that this action is not maintainable, and that the Defendant is entitled to the judgment of the Court.

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BURROUGH J. I agree with my learned Brother, that it is not necessary for me to give any judgment, because I think that, which my Lord has delivered, contains every thing which I could say: but we are called on, individually, to give our opinion on a matter of great magnitude.

Now I find it necessary to refer to the libels stated in the special verdict. The jury have found, that the Plaintiff composed and published, stuck up, affixed, and distributed, in divers public streets and places within the city and liberty of *Westminster*, two libels; the one charges the then Lord Chief Justice of the Court of King's Bench with having committed a robbery on the Plaintiff, by passing a sentence on him to make money, and to put the king's fine into his own pocket, instead of its going into the public treasury. The Plaintiff, in this libel, then proceeds in these words, "I do hereby placard him as a disgrace to the Bench of Judges, the society of gentlemen, and the nation at large."

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large." I think it is highly fitting that every one should know what the charge was, upon which the magistrate, Sir *Nathaniel Conant*, proceeded.

The other libel, although aimed principally at Lord *Castlereagh*, a privy counsellor, also contains reflections upon the late Lord Chief Justice of the King's Bench; and in this, the Plaintiff says, "I placard him," (that is Lord *Castlereagh*) "for having stated a gross falsehood in the House of Commons, in a debate in the House, to answer his own purpose; in stating to the House, that I had petitioned government for the mercy of the crown, upon which the pillory sentence was taken off." He then says, "My petition was to the Prince Regent to be liberated, being unjustly convicted by Lord *Ellenborough*, to make money of me." Nothing can be more offensive or more scandalous, than the whole subject of the libels themselves. My Brother *Vaughan* has very properly said, in his argument for the Plaintiff, that the question to be decided is one of constitutional law, as it affects the liberty of the subject, and the freedom of the press; and, if I conceived that our decision would affect the liberty of the subject in any matter or manner in which it ought not to be affected, I should, with great reluctance, concur in a judgment in favour of the Defendant: or, if I thought it would affect the freedom of the press, I should be equally unwilling to do so; but I am clearly of opinion, that our judgment will have no such effect: on the contrary, I think it will protect the liberty of the subject, and the freedom of the press.

Whilst the press is used with that freedom of discussion and reasoning, which, in *England*, is indulged undisturbed to a great, and indeed to every useful degree, it will meet with the protection of the law, and the approbation of all men who wish well to their country,

country, and who know the blessings of a free constitution. But, when it is used to charge the first magistrate in our courts of law with corruption in his office, and a privy counsellor and member of parliament, with abusing his character and situation as a member of parliament, by stating falsehoods in the House of Commons to answer his own purposes, it appears to me, that this is an abuse of that freedom; and, in order to preserve the freedom, it is necessary that the abuse should be reprobated. The people of *England* have a serious interest in the characters and conduct of the Judges and others, who are appointed to serve the kingdom in high and important offices; and the individual men have a valuable property in their respective characters. I have not lightly introduced these observations; they are, in my view of the case, important, in leading to the opinion which I have formed: it is material to the case of the Defendant, and the justification which he has put on the record, to have thus stated what was the nature of the charge, on which the Defendant took the information, and committed the Plaintiff for want of bail.

This brings the case to the point to be decided, and that is, whether the matter contained in the information taken by the Defendant, a justice of the peace, was a matter within his jurisdiction; and whether he has proceeded so as to form a justification to the Plaintiff's action of assault and false imprisonment? Now the jurisdiction of a justice of the peace is founded on the commission of the peace, by which some powers are expressly given; it is founded on other powers incident to those which are so given, and on particular statutes, superadding powers and authorities in particular cases.

Now it is necessary to state the commission of the peace, for the sake of a few observations which I have to make on it, with a view to the case argued at *White*

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Friars (a). By the commission of the peace, the justices named in it are jointly and severally assigned, "to keep the peace, and to keep and cause to be kept, all ordinances and statutes for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people, in all and every the articles thereof;" then follow other powers, not necessary to be noticed. This part of the commission authorises all and each of them to act out of court. Then follows that clause in the commission, which constitutes the sessions. The commission authorises them to enquire the truth, by the oath of good men, "of all and all manner of felonies, witchcrafts, enchantments, sorceries, magic art, trespasses, forestallings, regratings, engrossings, and extortions whatsoever, and of all and singular other misdeeds and offences, of which justices of peace may enquire;" and also "of all those who, in the county aforesaid, have either gone or ridden, or hereafter shall presume to go or ride in companies, with armed force against the peace, to the disturbance of the people." Now it is very curious to observe the question at *White Friars*, on which all the law seems to have been got together, to decide what?—the question, whether the law was broken by an illegal assembly of people armed. Why this clause in the commission, is founded on an act of parliament, which the Judges, who met on that occasion, could never have seen, because the title of that act (2 *Edw. 3. c. 3.*) is, "No man shall come before the justices, or go or ride armed." The act is as follows; "Item, it is enacted, that no man, great nor small, of what condition soever he be, except the king's serjeants, in his presence, and his ministers, in executing of the king's precepts, or of their office, and such as be in their company, assisting them, and also upon a cry made for arms to keep the peace, and the same in

(a) *Year Book*, 2 H. 7. fol. 2, 3.

places where such acts happen, be so hardy to come before the king's justices, or other of the king's ministers, doing their office with force and arms, nor bring force in affray of the peace; nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure." If those justices had seen this act of parliament, which makes the very thing about which they were questioning unlawful, could they have entertained any doubt that the peace in that case was broken? It is clear, they had not seen it. This is the foundation of that clause in the commission of the peace which I last read. Then, it is very material to observe, that, in the enumeration in the commission, treasons are not mentioned: there is no authority to enquire of treasons, yet no man can entertain a doubt, that justices of the peace, out of sessions, may take informations in cases of treason, and cause the accused to be apprehended and committed to the gaol, to be tried at the assizes, under the authority of commissions, which expressly extend to treasons. Justices, then, have no authority, under that clause which enables them to hold a Court, to try treasons; but their authority must exist on a prior part of the commission, which directs them to keep the peace. If this be so, we are not to look for what justices can do at sessions, as comprehending the whole of their authority. We have, however, in the case of libel, the strongest authority for saying it is indictable at the sessions. Treason, however, cannot be prosecuted at the sessions; yet, if the magistrates have power to proceed on it for the purpose of commitment, it must be under the first part of their commission, by which they are assigned jointly and separately to keep

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the peace, "and to cause to be kept all ordinances and statutes made for the good of the peace, and for conservation of the same, and for the quiet rule and government of our people."

Now it is said, in the case of *The King v. Kendal and Roe (a)*, that secretaries of state may commit as conservators of the peace did at the common law; and, that it was incident to the office, as it is to the offices of justices of the peace, who are not authorised by any express words in their commission to that purpose, but do it *ratione officii*. In the next place, it is admitted, and indeed no one can deny it, that justices of the peace may commit for want of bail, for an actual breach of the peace; but, it is contended, they cannot do so in the case of a libel, which is indictable, and before the justices too, at their sessions; and, it is said, they cannot, because libel is not attended with an actual breach of the peace. Now there might be some colour for this, if, upon enquiry, it were found that they could not do so in any case where there was not an actual breach of the peace: but it is clearly otherwise, for they can do so, and always have done so, in other cases in which there is no actual breach of the peace, but a direct and manifest tendency to a breach of the peace. What answer can be given to the case of an intended duel, of which the magistrate has personal knowledge, or has an information on oath? May he not arrest both the parties, and for want of bail commit the challenger to gaol, to be tried at the sessions for the challenge? And may he not, if bail be given, require the challenger to give also sureties of the peace in the meantime? This practice is inveterate, and is founded in necessity, and yet here is no breach of the peace. I am of opinion, that the Defendant was justified in taking the informa-

(a) *Salk.* 347.

tion and committing the Plaintiff, in the case disclosed in the present record. His duty and authority, by the commission, are to keep the peace, and to cause all ordinances and statutes for the good of the peace, and for preservation of the peace, to be kept; and no more effectual step can be taken for this purpose, than to take information against one who has done an act which has a direct and manifest tendency to provoke a breach of the peace, and commit him to prison if he cannot find bail.

In *Sir Baptist Hicks' case* (a), a libel is said to be indictable for this reason, "the king and commonwealth are interested in it, because it is a provocation to a challenge and breach of the peace." A challenge is not in itself a breach of the peace; but, to give a challenge, is indictable, as I have before suggested, and a ground for a magistrate's interference before indictment found. But, suppose it cannot be clearly ascertained that a challenge has been given, but, that there is a reasonable ground to suppose, that a duel is intended; it cannot be controverted that a magistrate might act and secure the parties, and he would be highly to blame if he did not do so; yet there is no breach of the peace but in contemplation. As to the tendency, even of slanderous words, to provoke a breach of the peace, there is a well known fact in the history of the criminal law of this kingdom; the outrage on *Sir John Coventry* (which was the occasion of passing the statute of the 22 and 23 *Car. 2. c. 1.*, called after his name, the *Coventry act*) was occasioned by mere words spoken in parliament. How much stronger, then, is the case on this record? A noble Lord, filling the high office of Chief Justice of the King's Bench, is charged with corruption in his office, and placarded as a disgrace to the

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Bench of Judges, as a disgrace to the society of gentlemen, and a disgrace to the nation at large; and another noble person in high office, and a member of parliament, is charged with uttering falsehoods in parliament, to answer his own purposes. Independently of the offence to the public at large, had not these libels a direct and immediate tendency to provoke a breach of the peace, and must they not be taken to be intended to irritate and provoke the individuals libelled? Nay, does the evil stop here? Must they not have had the same effect on the relatives and dependants of those noblemen? Now all our law books, from the case *De Libellis famosis* to the time of Sir *William Blackstone*, speak uniformly of this tendency of libels. It is hardly necessary to repeat the authorities, particularly as they have been mentioned at the bar; but *Blackstone*, after speaking of challenges, in page 150 (a) says, "Of a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed." It is not necessary to maintain that a libel is a breach of the peace, nor to rely on the conclusion of an indictment for a libel, which has ever been alleged to be against the peace. It is, however, certain, that in the case of the Seven Bishops, three Judges held it a breach of the peace, and the other Judge did not give any opinion on

(a) *Bk. 4. c. 11. s. 13.*

that

that subject, although it is said in *The King v. Wilkes* (a), that he was of a different opinion: in that book, it appears that a most severe and unfounded reflection was made on the Chief Justice and the two Judges who concurred; and the reporter might well have omitted a passage, which, if it was warranted by the fact (and this seems very doubtful), was a libel on those Judges, whose character I have never heard impeached. I do not believe it was said. What authority had anybody for saying, that the fourth Judge was the only honest man of the four, because he differed from the rest? In point of fact, he did not differ from them; and I do not see any thing which reflects on their characters.

All our law books, then, uniformly speak of the direct and immediate tendency of libels to cause breaches of the peace. I am, therefore, of opinion, that, in principle, the justification of the Defendant is well made out, and that the judgment must be for him; because it has appeared to me, that he was well authorised in what he did by the commission of the peace, and by the nature of the crime itself. It is very strange, and hardly credible, that when that case of *The King v. Wilkes* was before the Court of Common Pleas, the Judges never thought of examining the Crown Office, to know the course of proceedings there. It is quite impossible that they could have ever known, that from the 3d year of Queen Anne down to the present time, there had been a course of precedents to establish the point. If they had known that, certainly some of the doctrines, supposed to have been laid down in that case, would not have appeared in it. But, it is observed, that the practice appears to have stopped about the 3d year of the late king; that is very easily accounted for, and I do not think it affords

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any objection to the precedents in the Crown Office before and since. In the course of the late reign, the course has been to file informations by the Attorney-General, where the libels were against the government, and individuals applied to the Court for leave to file informations; it is well known that it was the subject of clamour, that the Attorney-General was pursuing a course not warranted by the course of the law of the country, and that is the reason why the course has not been pursued. Now, when the practice comes back to the constitutional course, of which, one would suppose, those who are fond of libelling would not complain, it is said, "Now you are acting illegally, you are come back to the clear course of the common law, and go before the grand jury:—the former practice was unconstitutional, and this is illegal." I am happy to find, on looking through the case narrowly, and sifting all the authorities, that it is legal to proceed as this Defendant has done; I am satisfied it is constitutional; and, so far from affecting the freedom of the press, or the liberty of the subject, the prosecution of these gross cases, as this has been prosecuted, by information before a magistrate, will be found to be a more humane course than the other. I am of opinion, that the Defendant has well justified his acts, and that our judgment ought to be for him.

RICHARDSON J. After the full discussion which this case has received at the bar, and the able opinions of my Lord and my Brothers, I should well wish to be spared expressing the grounds of my opinion. In a matter of this importance, however, I think it necessary (and I shall do so as shortly as possible) to enter into the reasons which have led to that opinion; and, as it seems to me, the shortest way will be to take this course: first, to consider the usage, and then to consider whether

ther that usage is in any respect contrary to the principles of law, the authority of text-writers, or the authority of adjudged cases.

Now with respect to the usage, upon an investigation in the King's Bench alone there have been found, between the first year of Queen *Anne*, and the years 1763 and 1764, no less than upwards of 120 instances of persons bound in recognizances to appear and answer such things as should be objected against them; those are instances of persons charged with libels, and the greater part of the cases were not before officers of state, but magistrates. It further appears, that these returns are confined to the cases of recognizances entered into to appear, exclusively of which there are an infinite number. There are several cases of persons, who appeared by writs of *habeas corpus*, who had been committed and did not find bail; these are authorities to the same extent: there is a further class of cases, where such jurisdiction was also exercised in the case of seditious words. It is difficult to find any more satisfactory mode of ascertaining the common law, than a reference to unvaried and undisputed usage for a length of time. Unless it is shewn, that such usage is contrary to the law of the country, or, that it has been impugned by eminent writers, I do not see how any Court in *Westminster Hall*, or anywhere else, could doubt that a usage so sanctioned is founded in law.

Is this usage, then, contrary to the authorities of the old text-writers? Of these the first is *Dalton*, whose book was published in the reign of *James the First*, and which, though not a judicial authority, is of considerable weight on points of this nature. I find it stated, in chapter 170 of that writer's work (a), that, "for mis-

(a) *s. 4. p. 582.*

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demeanours done against the king's peace (as for treason, felony, or breaking of the peace, &c.) the offenders, as well by the common law as by divers statutes, may be arrested and imprisoned by the officers of justice, and sometimes by private persons, without presentment." The passage continues, "and these being by the law of the realm" (it is true the writer does not mention more than treason, felony, or breaking of the peace), "are warranted by *Magna Charta*." By referring to another part of his work, I think what *Dalton* meant will be made clear. In chapter 124 (a) I find it stated, "Libellers also may be bound to their good behaviour as disturbers of the peace;" and he assigns this reason; "for such libelling and defamation tendeth to the raising quarrels and effusion of blood, and are especial means and occasions tending and inciting greatly to the breach of the peace." Such appears to have been the opinion of that text-writer.

The next, in point of order, is my Lord *Hale*; and it appears to me that Lord *Hale*, in chapter 50 (b), though speaking of felony, does not abstain from expressing his opinion as to the jurisdiction of magistrates. It is impossible to doubt, that the passage respecting justices of the peace and their jurisdiction applies to other offences besides felonies. In the second paragraph of the chapter he says, "I shall consider of arrests and imprisonment for capital offences:" then he mentions how offenders are generally treated when they are arrested. He then proceeds, in page 579, as follows: "Justices of *oyer* and *terminer* may also issue their warrants in the counties within their commission for apprehending felons or other malefactors, or for surety of the peace;" certainly not confining himself to felonies: and then follows the passage to which I referred before,

(a) *J. 2. p. 412.*(b) *p. 57.*

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"Justices of peace may also issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions of the peace." If Lord *Hale* had intended to speak of felony only, would he have used such language? Would he not have limited his assertion to cases of felony? But, here, he speaks of a power to issue warrants "for apprehending persons charged of crimes within the cognizance of the sessions of the peace; and this, though the offender be not yet indicted." The opinion of Lord *Hale*, therefore, appears to me to be most express to the same effect.

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The next text-writer is Serjeant *Hawkins*. I do not mean to state in detail what he says upon the subject; but, coupling chap. 13. sect. 15. with chap. 8. sect. 38., of the second book, I consider it quite clear, that his express opinion was, that justices of the peace had an authority to grant their warrants, not only for treason, felony, or *præmunire*, but also for other offences against the peace; and he classes libels as offences against the peace, over which the magistrates have jurisdiction. Thus, then, stands the authority of the text-writers upon the subject in direct confirmation of the usage: that usage by no means appears to have originated in the reign of Queen *Anne*, we should rather presume that it prevailed from all time; and if a usage is found to have existed a hundred years, there is no reason to look further. But the reason why there are no older precedents is because the House of Lords was satisfied.

With respect to Lord *Coke*, I do not find any opinion of his as to magistrates and their powers on the subject of libel; but an extraordinary proposition, which goes a great deal too far, is cited from his 4th Institute, namely, that a justice of peace cannot, in cases of felony, apprehend a felon prior to indictment. His Lordship seems, afterwards, in the course of that same sec-

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tion (a), to admit, that the law became otherwise since the statutes 1 & 2 *P. & M.* c. 13. and 2 & 3 *P. & M.* c. 10. It is strange that, having those statutes then before him, he should suppose arrests by magistrates for felony, prior to those statutes, to be contrary to law. The first of those statutes was intended to restrain justices, not from arresting, but from liberating offenders from arrest, in a manner more extensive than was found convenient to the public; and that statute refers to the stat. 3 *H.* 7. c. 3., made to restrain magistrates from admitting to bail too largely, which last mentioned statute refers to one of still earlier date, namely, 1 *Ric.* 3. c. 3. All these statutes, as is well observed by Lord *Hale*, in his second volume, p. 109. (b), import, that the apprehension of persons for felony before indictment found is lawful and right. I think it unnecessary to say any thing more about Lord *Coke's* opinion in that work (c), which, perhaps, did not receive his final approbation: the work is fully considered in 2 *Hale's Pleas of the Crown*, pp. 107, 108, 109, and 110; and, I think, satisfactorily refuted.

Such being the usage, has it been disapproved of by Courts of Justice? I shall mention, shortly, five cases. The first is the case of the Seven Bishops. Those seven persons were defended by the most eminent persons at the *British* bar, but no point was made concerning the authority of a secretary of state to hold to bail; and, when we refer to *The King v. Wilkes*, we find Lord *Camden* relying on the silence of the counsel for the Seven Bishops on an objection pressed by the counsel for *Wilkes*, as a reason for saying that there was no weight in that objection. The case of *Kendal and Roe* I will mention here, although that was a case of a commitment by the secretary of state, and a commitment

(a) 177. (b) c. 13. (c) *Jurisdiction of Courts*

for treason, in both of which particulars it differs from the present case: but I think it material on account of the course of the argument and the opinion of the Judges. The counsel for the Defendants objected, that the secretary of state could not commit for treason, because he could not administer an oath, an objection not applicable to the case of a justice of the peace. Lord *Holt* says, as reported in 1 *Ld. Raym.* (a), "And at common law, before there were any justices of peace, there were commitments; for," says his Lordship, "the justices of gaol delivery ought to impanel a grand jury, to enquire of all offences committed by those in gaol; therefore there must have been a commitment precedent." Mr. Justice *Rokeby* says, "At common law conservators of the peace could not execute their office, without a power to commit, and secretaries of state are of the same nature as conservators of the peace were, and no statute gives power to justices of the peace to commit; but it is incident to their office." It falls within the general terms of their commission, which empowers them individually and collectively to keep the peace; therefore, it is in them as incident to their office, and gives them authority to keep the peace, and do all acts that are necessary to that great and important public object.

There are two other cases, *The Queen v. Derby*, and *The King v. Skuckburgh*, both cases of arrest by a secretary of state for libels. The case of *The King v. Skuckburgh* (b), has not been mentioned in the course of this argument; I will, shortly, state what that case is. The Defendant there, being taken up by warrant from the secretary of state, for publishing "*Old England's Te Deum*," a blasphemous libel, was brought up by *habeas corpus*, in order to be bailed, and offered bail to enter into the common recognisance for his appearance, from time to

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(a) 65.

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time, to answer such matters as should be objected against him on behalf of the crown. The reporter refers to this as the common usage; but "Mr. Attorney-General insisted on bail for the Defendant's good behaviour also." This is before indictment found. What says the Lord Chief Justice? Does he suggest that the Defendant could not be arrested at all? Quite the contrary. Lord Chief Justice *Lee* said, "it had often been taken both ways," (that is to say, both to appear and answer, and also for good behaviour,) "and he intended to take the opinion of all the Judges; so at present the Defendant himself only entered into a recognizance for his appearance, and into a rule to put in bail for his good behaviour, if the Judges, or the major part of them, should be of opinion that he ought." This, then, is certainly an authority to show, that a person may be apprehended in a case of libel, prior to indictment: it is sanctioned by the Court; and the common usage was, that the Defendant should enter into a recognizance to appear and answer, unless some difference could be made between a commitment of the secretary of state and a commitment of a magistrate. The argument against the secretaries of state is, that they cannot commit, because they have not the power which the justices of the peace have, of administering an oath; and the Court say they have that power, as conservators of the peace; then it follows, *a fortiori*, that the justices of the peace must have it.

In the case of *The Queen v. Derby*, (a commitment by a secretary of state for a libel,) the Defendant's counsel insisted, that a libel was not an offence for which bail could be required before indictment found; but that is by no means the opinion of the Court; — quite the contrary. The Defendant's counsel said, that commitments were punishments only after conviction, and not before; and one of his objections was, that the warrant to apprehend and bring before a magistrate excluded

cluded bail in the mean time, and, therefore, was unlawful. The Court said, it is the constant course to bring before a magistrate in the first instance, and the person who brings him cannot take bail till he comes before a magistrate, and that is in his favour, because he may excuse himself of the charge or enquiry. My Brother *Vaughan* says, that they did not venture to argue, that a magistrate could commit. They said, this is not a commitment to prison, it is an arrest for examination, for which bail cannot be taken; but it was quite unnecessary to say, that magistrates could commit afterwards. If they could arrest before examination, if the examination was not favourable to the Defendant, he would then be committed unless he found bail.

These are all the cases, except that of *The King v. Wilkes*, where no such point is made by Mr. *Wilkes* himself or the counsel who assisted him, as, that, if he had been a private individual, he would not have been amenable to the commitment. He put it on the ground, that he was not charged on oath, that the libel was not set out at length, and that he was entitled to the privilege of parliament: the Court over-ruled the two first objections, and abstained from saying that a secretary of state has more authority than a justice of the peace. With respect to the second point, what does his Lordship say? It is impossible that he could entertain any doubt that a libel was a legitimate ground for holding a common person to bail: he says the libel need not be set out at length; why? As to the offence of a libel, he says, "it is such a misdemeanor as we should require good bail for, and such as the party may be able to procure." So that when the objection was, that the libel ought to have been set out to enable the Court to judge of the quality of the bail to be required, his Lordship says, we can well judge of that without the libel being set out; for

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we know it is a high misdemeanor, and such a misdemeanor as would make it our duty to require good bail, having regard to the quality of the offender. Surely this is an opinion, on his part, that in a case of libel a man may be held to bail, and bail according to his quality. But his opinion, and that of the rest of the Court, was, that the Defendant was entitled to his discharge by reason of his privilege of parliament; and, I think, there must be some error in the phrase in *Wilson's* report, where his Lordship is supposed to have said, "It is absurd to require surety of the peace, or bail, in the case of a libeller," having before said a libel was a misdemeanor, and that good bail ought to be taken. I entertain no doubt, that the word has crept in by mistake on the part of Mr. Serjeant *Wilson*: it is not found in the report in the 11th volume of *Hargrave's State Trials*, 304, 305. His Lordship is there made to say, "Perhaps it implies an absurdity to demand sureties of the peace from a libeller." The Defendant was discharged on the ground of his privilege of parliament, although the Court, there, and in all other cases, seem to have entertained no doubt that a Defendant charged with libel might be held to bail.

Having thus gone through, as shortly as I was able to do so, the usage, the authorities of the text writers, and the cases, they seem all to agree in one and the same point, namely, that the course adopted by the Defendant in this case is agreeable to the ancient course of the common law; and I am, therefore, clearly of opinion, that the Defendant is entitled to the judgment of the Court.

Judgment for the Defendant accordingly.

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ATTORNEY.

Where an attorney has been struck off the rolls of the *K. B.* on a report of the Master, he will, on motion, be struck off the rolls of this court, unless sufficient cause be shown to the contrary. In *Re R. P. Smith.* Page 522

AUTREFOIS ACQUIT.

Plea, that prisoner had been acquitted on an indictment for murdering a child, by *administering a certain deadly poison, to wit, oil of vitriol, and by forcing the child to take, drink, and swallow down a large quantity of the said oil of vitriol, knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and by that sickness languished and died: Held, (by eleven judges, Wood B. absent,) a good bar to an indictment (1st count), for murdering the same child by administering a large quantity of oil of vitriol, and forcing the child to take into his mouth and throat a large quantity of the said oil of vitriol, knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling, occasioned thereby, languished and died; (2d count), for murdering the child by administering a certain acid called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat,*

AWARD.

by means whereof he became disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder, occasioned thereby. *The King v. Clark.*

Page 473

AVERMENT.

See PLEADING, 3, 4, 6.

AVOWRY.

See PLEADING, 2.

AWARD.

1. Agreement for a lease for 63 years from 1st of May 1801; the lessee to be allowed three years from that time for winning the colliery without payment of any rent. An arbitrator, being authorised to give such direction for a lease according to the agreement as he should think fit, directed a lease for 63 years from the 1st of May, 1804: Held, that he had exceeded his authority, and that the award was bad. *Bonner v. Liddell.* 80
2. *A., B., C., D., E., and F.,* partners in trade, submitted to arbitration differences which had arisen between them in their trade. *A., B., and C.,* gave a joint and several bond to *D., E., and F.,* conditioned for the performance of an award, and *D., E., and F.,* gave a similar bond to *A., B., and C.* The arbitrator awarded, among other things, that *B.* should pay a sum of money to *A.* *A.* having sued *B.* on the award, held (by three judges against *Richardson J.*) that *A.* might recover the sum awarded to him. *Winter v. White.* 350

BANKRUPTCY.

BAIL.

See PRACTICE, 2, 4, 13, 14.

BAIL-BOND.

See PRACTICE, 6, 15.

BANKRUPTCY.

And see EVIDENCE, 4. VENDOR AND
VENDEE.

1. In order to constitute a party a trader within the meaning of the bankrupt laws, it is sufficient that he acknowledge himself to have been in partnership with one who was a trader; and is proved to have given directions in the concern; though no act of buying or selling during the time of the partnership can be established in evidence. *Parker v. Barker.* Page 9
2. The bankrupt lay in prison two months on a civil process, after a criminal process had been discharged, and the discharge had been delivered to his attorney: Held, that this lying in prison constituted an act of bankruptcy, though it did not appear that the bankrupt had personal notice of the discharge. *The King v. Page.* 308
3. Where a trader, one of two partners, conveyed to trustees, not his creditors, all his freehold, leasehold and copyhold, but not his personal property, (which formed but a small part of the whole,) in trust by sale, mortgage, or other disposition thereof to raise money, whereby the trader might be enabled to facilitate a settlement with his creditors, (the pecuniary assets of the firm not being sufficient to cover the pecuniary engagements of the firm,)

BANKRUPTCY. 605

and also gave to other persons, not creditors, a power of attorney, enabling them in the fullest manner to act for him in this settlement, and afterwards prepared a deed for the purpose of conveying all his above mentioned landed property to two other trustees, with a view to raise 170,000*l.* in negotiable bills, and to indemnify the drawers of those bills, but nothing was ever done under this latter deed: Held, that these circumstances did not constitute an act of bankruptcy. *Berney v. Davison.* Page 408

4. The transfer of a trader's property, under circumstances similar to those stated in the case of *Berney v. Davison*, is no act of bankruptcy, notwithstanding a difference from that case in the following particulars: 1. no mention of the trader's personal property; 2. no statement that the trustees to the transfer were not creditors of the trader; 3. no mention of the trader's motive; 4. no mention of the abstract of the unexecuted deed furnished to the purchasers; 5. an additional statement, that on or about the time of the execution of the transfer, the trader was insolvent, and stopped payment. *Berney v. Vyner.* 482
5. The house of the plaintiff, an uncertificated bankrupt, was broken open, and effects, acquired by him subsequently to his bankruptcy, were taken by the defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The bankrupt hav-

606 BILL OF LADING.

ing sued the defendants in trespass, they obtained, after a rule for plea, a surrender of the assignees' interest in the effects seized: Held, that this was a ratification of the seizure, and that the plaintiff could not recover. *Hull v. Pickersgill and others.* Page 282

6. A bankrupt, who has surrendered to his commission, is not guilty of felony within 5 G. 2. c. 30. though he refuse to answer questions concerning his property. *The King v. Page.* 308

BARON AND FEME.

And see VARIANCE, 2.

The husband is not liable in an action *for use and occupation* to pay for the enjoyment of a house by his wife *dum sola*. *Richardson v. Hall.* 50

BASTARD.

See MONEY HAD AND RECEIVED, 1.

BILL OF LADING.

By bill of lading, a ship-owner undertook, that goods should be delivered safe, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, *save risk of boats, so far as ships are liable thereto, excepted.*" The goods having been dispatched from the ship, in her boat, according to the usual course of trade in the *West Indies*, were, together with the boat, lost in a hurricane. Held, that the ship-owner was not liable, under the terms of the bill of lading, to make good the loss. *Johnston v. Benson.* 454

CONTEMPT OF COURT.

BOAT.

See BILL OF LADING. EVIDENCE, 5.

BOND.

See AWARD, 2. VARIANCE, 1.

BUM-BOAT ACT.

See EVIDENCE, 5.

BURIAL.

See FORGERY.

CHACE.

See TRIAL AT BAR.

CHECK.

See MONEY HAD AND RECEIVED, 2.

CHESTER.

See PRACTICE, 1.

COGNIZANCE.

See REPLEVIN, 2. STATUTE OF LABOURERS.

COMMISSIONERS.

See EVIDENCE, 7.

COMPENSATION.

See WITNESS, 1.

COMPOSITION.

See PROMISSORY NOTE. TITHES, 1.

CONSIDERATION.

See PROMISSORY NOTE.

CONTEMPT OF COURT.

See PRACTICE, 3.

CON.

CONVEYANCE.

See BANKRUPTCY, 3, 4.

CONVICTION.

See EVIDENCE, 5, 6.

CORN-RENT.

See QUARTER SESSIONS.

COSTS.

And see PRACTICE, 7.

1. The statute 43 Geo. 3. c. 46. § 3. for allowing costs to a Defendant, in case of arrest without probable cause, does not extend to cases where a Defendant pays money into Court, and the Plaintiff takes it out, though it be a much smaller sum than that for which the Defendant is holden to bail. *Butler v. Brown.* Page 66
2. Where one of several issues is found for the Defendant, he is not entitled to his costs on that issue, though, in consequence of the Plaintiff's withdrawing his record at the assizes for the purpose of an amendment and re-entering it, the Defendant's witnesses were obliged to wait several days longer than they would otherwise have done. *Trotman v. Holder.* 222
3. The assignees of a bankrupt, when nonsuited, are not entitled, under 49 Geo. 3. c. 121. § 10., to the costs of proving, after notice to do so, the commission, trading, act of bankruptcy, and petitioning creditor's debt. *Atkins and others, Assignees, v. Seward and others.* 275
4. Where the Defendants were held to bail for 130*l.* 0*s.* 11*d.*, and the cause being referred to an arbi-

trator, he found that only 20*l.* 4*s.* 9*d.* was due from them, the Court would not allow the Defendants their costs under 43 G. 3. c. 46. § 3. *Payne v. Acton and others.*

Page 278

5. Trespass, four counts; for fishing in Plaintiff's close covered with water, several fishery and free fishery, and carrying away Plaintiff's fishes. Pleas, — first, not guilty; second, that the close belongs to *W. A.*, Defendant's master; third and fourth, that the several and free fishery belong to *W. A.* New assignment, setting out abutments of Plaintiff's close, and replication traversing *W. A.*'s several and free fishery. Pleas to new assignment. — First, not guilty. — Second, that *locus* newly assigned is the close of *W. A.* — Third, that *W. A.* has common of fishery over the *locus* newly assigned. The issue on the common of fishery was found for the Defendant; as also that part of the first issue, which related to the second, third and fourth counts of the declaration. The other issues were all found for the Plaintiff, with 1*s.* damages, and 40*s.* costs on the first count. The Court confirmed the taxation of the prothonotary, who had allowed the Defendant general costs in the cause on the issues found for the Defendant, and the Plaintiff the costs of the issues found for the Plaintiff. *Benett v. Coster.* 465
6. A Defendant in *replevin*, residing out of the jurisdiction of the Court,

is liable to give security for costs.
Selby v. Cruckley. Page 505

7. The avowant in *replevin* on a distress for poor rates is only entitled to single costs, under 43 *Eliz. c. 2.* § 19. *Butterton v. Furber.* 517
8. Plaintiffs, who live out of the jurisdiction of the Court, may be compelled to give security for costs, though such Plaintiffs sue as executors. *Chevalier v. Finnis.* 277

COVENANT.

1. When a party takes an assignment of lease by way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied, or become possessed, in fact. *Williams v. Bosanquet.* 238
2. Covenant for quiet enjoyment during a term, "without the lawful let, suit, interruption, &c. of *J. M.*, his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever, having or claiming any estate or right in the premises, and that free and clear, and freely and clearly discharged, or otherwise, by *J. M.*, his heirs, executors, or administrators, defended, kept harmless and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents, and arrears of rent, statutes, judgments, recognizances, &c. made or suffered by *J. M.*, or by their or either of their acts, means, default, procurement, consent or privity," preceded by a covenant

DEED.

that the lease was a good lease, notwithstanding any act of *J. M.*, and followed by a covenant for further assurance by *J. M.*, his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them: Held, by three Judges against *Park J.*, that the covenant for quiet enjoyment extended only against the acts of the covenantor, and those claiming under him, and not against the acts of all the world. *Nind v. Marshall.* Page 319

CREDIT.

See PAYMENT.

DEED.

And see PRACTICE, 9.

A settlement made on the marriage of *H. W.* with *A. D.* (after giving the husband and wife respectively, estates for life, with a power of appointing by deed or will jointly, during the coverture, and in default of such appointment, separately, after the death of either) contained the following limitation in default of such appointment: "To the use of all and every the child and children of the marriage, both sons and daughters equally, part and share alike, if more than one as tenants in common and not as joint tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall

shall be more children than one of the said intended marriage, and any such child or children shall happen to die under the age of twenty-one years, without issue of his or their body or bodies lawfully issuing, then, so often and as to the part or share, part and shares of all and every such child or children, to the use of the surviving children, part and share alike, if more than one, as tenants in common, and not as joint tenants, and to the heirs of the body of every such child and children, until every such child and children should be dead; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child in tail, and for default of issue of the marriage, and in case there should be issue, who should all die without issue under the age of twenty-one years, then to the heirs and assigns of the survivor of *H. W.* and *A. D.* in fee." The marriage between *H. W.* and *A. D.* having taken place, *H. W.* died intestate, leaving his widow and two children, *Joseph* and *Ann*. The widow made her will, devising the property over only in case of the death of both children without issue before twenty-one, and died, leaving the two children, *Joseph* and *Ann*, who both attained the age of twenty-one years. *Ann* married *T. Weatherall*. *Joseph* died shortly after, having made his will, by which he gave all his

real estates in the county of *K.* or elsewhere to his sister *Ann*, the wife of *T. Weatherall*, in fee: Held, that *Ann*, who was already tenant in tail of one moiety of the lands comprised in the marriage settlement, became, as the heir at law of *J. W.* tenant in fee of the other moiety. *Levin v. Weatherall*.

Page 401

DEFAMATION.

The Defendant having written a letter, blaming the person to whom it was addressed for employing the Plaintiff to sue, added, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it. You may think, when you have ordered your attorney to write to Mr. B., he would not do any more without your further orders; but if you once set him about it, he will go to any length without further orders:" Held, in an action for defamation, that the jury were properly directed to consider whether these expressions were meant of the profession in general, or of the Plaintiff in particular; and that it was not necessary to leave it to them to consider whether this was a confidential communication, or a malicious attack on the Plaintiff's character. *Godson v. Home*.

7

DEVISE.

1. A devise of "my freehold estate, consisting of thirty acres of land, more or less, with the dwelling-house

house and all erections on the said farm, situated at *Sudbury Harrow*, in the county of *Middlesex*," passes an estate in fee-simple. *Harding v. Gardner.* Page 72

2. Devise of certain freehold and copyhold lands and messuages at *H. W.* and *S.* to trustees to the use of devisor's daughter, *E. A. P.*, for life, and, after her decease, then to the use of the issue of her body lawfully begotten; and, in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then (as to the lands at *H.*) over to devisor's brother, *S.*, for life, and, after his decease, then to the use of the issue of his body; and, in default of issue, or in case none of such issue lived to attain the age of twenty-one years, then to devisor's brother *H.* for life, and after his decease, then to the issue of his body lawfully begotten; and, in default of issue, then to devisor's sister *E.*, her heirs and assigns for ever. And, as to the lands at *W.*, upon the death of *E. A. P.* without issue, or, if issue, they should not live to attain the age of twenty-one years as aforesaid, to his brother *H.*, his heirs and assigns; and, after the death of *E. A. P.*, without issue as aforesaid, all the messuage at *S.* to his sister *E.*, her heirs and assigns: Held, that *E. A. P.* took an estate for life in the premises. *Merest v. James.* 484

DISTRESS.

See COSTS, 7. REPLEVIN, 1. POWER.

STATUTE OF LABOURERS.

EJECTMENT.

And see EVIDENCE, 2.

A. and *B.*, tenants in common, having agreed to divide their property, and that *Blackacre* should belong to *A.*; the occupier of *Blackacre*, who, after this agreement, had paid his whole rent to *A.*, cannot, in an ejectment brought against him by *A.*, object that the partition deed between *A.* and *B.* is not executed. *Doc. dem. Prichitt v. Mitchell.* Page 11

ERROR.

A Plaintiff in error in the Exchequer chamber is not confined to the taking out one rule in each term, but may proceed as quickly as he pleases. *Home v. Bentinck.* 514

EVIDENCE.

1. A receipt for a promissory note, expressing a prospective and executory consideration on which the money thereby secured is to be paid, may be given in evidence as a receipt on a receipt stamp, and does not require an agreement stamp, as evidence of a contract. *Watkins v. Hewlett.* 1
2. Upon the trial of an ejectment, evidence was received, that the usual and accustomed form of leases of the estate contained in a marriage settlement, for lives or years determinable on lives as well prior as subsequent to that settlement, was with a conditional proviso of re-entry, similar to that

in

in the indenture then before the court: Held, by three judges that the evidence of the former leases was well received. *Doe dem. Jersey v. Smith.* Page 97

3. Where the Defendants, having had notice to produce the probate of the will of their testator, refused to produce the same: Held, that an instrument produced by the officer of the ecclesiastical court, purporting to be the will of the Defendant's testator, and indorsed by the officer, as being the instrument whereof probate had been granted to the Defendants, and that they had sworn to the value of the effects, was admissible in evidence in an action against the Defendants for money had and received by their testator in his lifetime. *Gorton and Another, Executors, v. Dyson.* 219

4. Where the question was, whether a bankrupt had possession of a stack of bark as reputed owner: Held, that evidence of his being reputed the owner of it was properly admitted, facts having been proved, which amounted to a disposition of the property by him as owner. *Oliver and Others, Assignees, v. Bartlett* 269

5. In trespass against magistrates for taking and detaining a vessel, a conviction by Defendants under the Bum-boat act, (no defect appearing on the face of the conviction,) is conclusive evidence that the vessel in question is a boat within the meaning of the act, and properly condemned. *Brittain v. Kinnaird.* 432

6. In an action against a magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained in it. *Brittain v. Kinnaird.* Page 432

7. The commissioners under an enclosure act having made minutes of their proceedings: Held, that parol evidence of the divisions and allotments was inadmissible, the minutes of the commissioners not being produced or accounted for. *Bendyshe v. Pearse.* 460

EXCISE.

In an action against a wine cooper, for changing on the road wine which she had been hired to carry from one house to another, the Court will not *presume* that the wine was removed for the purpose of sale, and so consider the transaction illegal under the excise laws. *Toussaint v. Darbon.* 5

EXCHEQUER, COURT OF

See PRACTICE, 5.

EXCHEQUER CHAMBER.

See ERROR.

EXECUTION.

And see FOREIGN ATTACHMENT. PRACTICE, 7. SHERIFF, 2.

Where *A.* mortgaged land with a wind-mill on it, (built chiefly of wood,) the deed containing also a bargain and sale of the mill: Held, that it could not be taken in execution by a creditor of *A.*, though *A.* remained in possession. *Steward v. Lombe.* Page 506

EX.

EXECUTOR.

See COSTS, 8.

EXECUTRIX.

See REPLEVIN, 2.

EXTENT.

See SHERIFF, 2.

FELONY.

See AUTREFOIS ACQUIT. BANKRUPTCY, 6. FORGERY.

FIERI FACIAS.

See EXECUTION. SHERIFF, 2.

**FINES AND RECOVERIES,
AMENDMENT OF.**

1. Where in a fine the name *George*, had been inserted by mistake, instead of *John*, the Court allowed the right name to be substituted, an affidavit explaining the mistake having been put in. *Dobson and others, v. Dewar.* 15
2. The Court allowed the warranty of a fine to be amended, by altering it from a warranty by the husband and wife and heirs of the husband, against themselves and the heirs of the wife, to a warranty by the husband and wife and the heirs of the wife, against themselves and the heirs of the wife. *Hannaford and Wife, Plaintiffs. Pearce, Defendant.* 68
3. *A.* was tenant for life of two moieties of common field land called *Blackacre*, with remainders

to *B.* and *C.* in common in tail. *A.* was also tenant in fee of other common field land called *Whiteacre*. The commissioners under an inclosure act allotted to *A. Greenacre* in lieu of *Blackacre* and *Whiteacre* conjointly, without distinguishing the portion allotted in right of each. *A.* devised all his lands to *D.* in fee, and died. Upon a conveyance by *B.* and *C.* to *D.* of all the land allotted to *A.* in right of *Blackacre*, and a recovery suffered of the entirety of certain acres fewer than were comprised in *Greenacre*, *Burrough J.* held, that all the estate of the tenants in tail was comprised in that recovery, and the Court refused to amend it by the insertion of more acres. *R. Barlow, Demandant; Macdougall, Tenant; W. Barlow, Vouchee.*

Page 69.

4. Where a recovery 50 years old was found, by mistake, to comprise only two messuages and 20 acres of land, instead of six messuages and 300 acres of land, the blunder being wholly unexplained and unaccounted for, the Court refused to permit an amendment by substituting the larger quantity. *Collingwood, Demandant; Wilmet, Tenant; Lord Howe, Vouchee.* 83

**FINES AND RECOVERIES,
PRACTICE OF PASSING.**

1. Where the præcipe in the vouchee's warrant of attorney in a recovery rightly described the parties to the plea, but the body of the warrant of attorney expressed,

pressed, that the vouchee appointed his attorney to gain or lose in a plea of land against the tenant, instead of the demandant, the Court refused either to amend the warrant of attorney, or to suffer the recovery to pass, and to construe the latter clause as repugnant and inoperative. *Morell, Demandant; Alban, Tenant; Hatchett, Vouchee.* Page 92

2. The Court will not entertain motions on the subject of fines and recoveries the last day of term. *Breach, Demandant; Hewitt, Tenant; Brierly, Vouchee.* 468
3. The Court refused to pass a fine where the affidavit, taken before a commissioner abroad, was written on paper. *C. Morgan and E. Morgan, Conusees.* 472

FOREIGN ATTACHMENT.

Money obtained of *garnishee*, under a foreign attachment, is not (unless execution be executed,) a compulsory payment, so as to effect a discharge of a debt due from *garnishee* to the Defendant-in-the-Lord-Mayor's-Court. *Wetter v. Rucker.* 491

FORGERY.

The 48 G. 3. c. 75. enacts, that bodies thrown ashore by the sea shall be buried by the parish-officer, and that, after such burial, a magistrate shall give the officers a certificate and order on the treasurer of the county, to pay them the reasonable and necessary expences of the funeral, which the

treasurer is, by the act, ordered to pay. The prisoner framed an order, purporting to be the order of a magistrate on the treasurer of a county, to reimburse one *Cose*, the expences of burying a dead body cast on shore: Held (by seven Judges against five,) that this was a forgery, though there was no such magistrate as the individual mentioned in the order, and though the order did not state *Cose* to be a parish-officer, or that the expences incurred were reasonable and necessary. *The King v. Froud.* Page 300

GARNISHEE.

See FOREIGN ATTACHMENT.

GUARANTEE.

See PROMISSORY NOTE. VARIANCE, 3.

HUNDRED.

In order to bring an action against the hundred, on the stat. 9 G. 1. c. 22. the notice required by the statute, must be given to some of the inhabitants of the hundred, before the Plaintiff's examination on oath is delivered to the magistrate. *Fowler v. Laninborough.* 64

HUSBANDRY.

See LANDLORD AND TENANT, 2.

INCLOSURE.

See EVIDENCE, 7.

INDICTMENT.

See AUTREFOIS ACQUIT. BANKRUPTCY, 6. FORGERY.

INJUNCTION.

See PRACTICE, 5.

INSOLVENT'S CERTIFICATE.

See PLEADING, 1, 5.

INSURANCE.

1. Where a vessel being under the conduct of a pilot, in going up a harbour, took the ground in the ordinary course of navigation, and afterwards being moored at a quay, on the ebb of the tide took the ground, fell over on her side, and was injured, and her cargo damaged: Held, that this was not a stranding, for which the insurer was liable. *Hearne v. Edmunds.*

Page 388

2. Policy of insurance on ship "at and from L., to her port or ports, place or places of discharge, and loading in *Africa* and *African Islands*, and *during her stay* there, and at and from thence back to L., or her final port or place of discharge in the United Kingdom, with liberty in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, as above, to sell, barter, and exchange goods, and load, unload, and re-load goods, at any or all of the ports and places she may call at, or proceed to." The insured, subsequently to the execution of the policy, inserted after the words,

"*during her stay*," the words, "and trade." Some of the underwriters assented to the alteration by subscribing their initials; others refused their assent. In an action against one who refused: Held, that the alteration was immaterial, and did not avoid the policy. *Sanderson v. Symonds.* Page 426

INTERLINEATION.

See INSURANCE, 2.

JUDGMENT.

See PRACTICE, 7, 11.

JUSTICE OF PEACE.

See EVIDENCE, 5, 6. HUNDRED. LIBEL. REPLEVIN, 1. STATUTE OF LABOURERS.

LAMBS.

See TITHES, 2.

LAND-TAX.

See LANDLORD AND TENANT, 1. PLEADING, 2.

LANDLORD AND TENANT.

1. If the land-tax and paving-rates are not deducted, (as they ought to be) from the rent of the current year, they cannot be deducted, or the amount of them be recovered back, from the landlord in any subsequent year. *Andrew v. Hancock.* 37

2. An usage for the landlord to pay a sum

a sum in compensation to the outgoing tenant, for labour and expence bestowed by him in tilling, fallowing, and manuring arable and meadow land, according to the course of good husbandry, the advantage of which labour and expence the tenant could not otherwise reap, is a reasonable usage. And such practice, being a mere usage of the neighbourhood, is not to be considered as a custom, strictly speaking, and need not be immemorial. *Dalby v. Hirst*. Page 224

LEASE.

See COVENANT, 1, 2. POWER. VARIANCE, 2.

LEGACY DUTY.

See ANNUITY.

LIBEL.

And see DEFAMATION. VENUE.

A justice of peace has authority to issue his warrant for the arrest of a party charged with having published a libel; and, upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law. *Butt v. Conant*. 548

MAGISTRATE.

See JUSTICE OF PEACE.

MARRIAGE-SETTLEMENT.

See DEED. POWER.

MANDAMUS.

See WITNESS, 2.

MEMORANDA, 471.

VOL. I.

MODUS.

See TITHES, 1.

MONEY HAD AND RECEIVED.

And see ANNUITY. EVIDENCE, 3.

SHERIFF, 2.

1. If the putative father of a bastard, pay, before its birth, a fixed sum to the parish-officers to discharge him of all future responsibility for the maintenance of the child, after the birth and death of the child he may recover back such part of the money as remains unexpended, as had and received to his use. *Watkins v. Hewlett*. Page 1
2. Where the Defendants presented for payment a post-dated check, knowing it to be post-dated, and that the maker of it was insolvent, and the plaintiffs, in ignorance of these circumstances, paid the check for the honour of the maker, expecting funds from him in a short time, though they had none at the moment, a verdict having been taken for the Defendants, with leave for the Plaintiffs to move for a new trial; the Court granted a new trial. *Martin and Others v. Morgan and Another*. 289

MORTGAGE.

See COVENANT, 1. EXECUTION.

MURDER.

See AUTREFOIS ACQUIT.

NOTICE.

See HUNDRED. PRACTICE, 11, 13.

TITHES, 1.

T

616 PERILS OF THE SEA.

PARISH-OFFICERS.

See MONEY HAD AND RECEIVED, 1.

PARLIAMENT.

A clothier who contracts with the colonel of a regiment to furnish the regiment with army clothing, is not thereby incapacitated by stat. 22 G. 3. c. 45. from being elected as a member to serve in parliament. *Thompson v. Pearce*. Page 25

PARTITION-DEED.

See EJECTMENT.

PARTNERSHIP.

See BANKRUPTCY, 1.

PARTNERSHIP-DEED.

See PRACTICE, 9, 10.

PAVING-RATES.

See LANDLORD AND TENANT, 1.
PLEADING, 2.

PAYMENT.

And see FOREIGN ATTACHMENT.
VENDOR AND VENDEE.

Seemle, that entering a sum to the credit of a party in a merchant's books is not payment, unless under an express assent, that such entry shall stand for payment. *Wetter v. Rucker*. 491

PAYMENT OF MONEY INTO COURT.

See COSTS, 1.

PAYMENT OF RENT.

See COVENANT, 1.

PERILS OF THE SEA.

See BILL OF LADING.

POLICY.

PLEADING.

And see AUTREFOIS ACQUIT. STATUTE OF LABOURERS.

1. A certificate obtained in *Newfoundland*, under the 49 G. 3. c. 27. s. 8., does not entitle the Defendant to be discharged on entering a common appearance, but must be pleaded in bar. *Philpotts and Wife v. Reed*. Page 13

2. An allegation of payment of land-tax and paving-rates due for any period preceding the current year, is no plea in bar to an avowry for rent arrear. *Andrew v. Hancock*. 37

3. The declaration averred that the Plaintiff had sowed divers, to wit, 20 acres of land, with wheat and clover: Held, that this was in substance an averment that the land was arable. *Dalby v. Hirst*. 224

4. The declaration averred the manuring of 10 acres of meadow land: Held, that this was in substance an averment that part of the land was meadow land. *Ibid*.

5. An insolvent's certificate, obtained in *Newfoundland* under 49 G. 3. c. 27. s. 8., may be pleaded in bar to an action in *England*, for a debt contracted in *England* prior to the insolvency. *Philpotts and Wife v. Reed*. 294

6. In covenant by assignee of lessor against lessee for rent arrear, an allegation that the lessor was possessed for the remainder of a term of 22 years commencing on &c. is material and traversable. *Carvick v. Blagrove*. 531

POLICY.

See INSURANCE.

POOR-RATE.*See COSTS, 7.***POSTEA.***See PRACTICE, 7, 8.***POWER.**

Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses and with such powers and provisoes and in such manner as was by her afterwards done, by a deed of settlement in consideration of marriage revoked the uses and appointed the lands, to hold to the use, after the marriage, of her husband for life *sans* waste, and after his decease to the use of herself for life *sans* waste, with remainder to divers other uses for the benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives or for years determinable on lives to any persons in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be, determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services,

or more, or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots which might be varied at will); and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. And, also, by indenture to demise any of the premises for any term absolute, not exceeding 21 years in possession and not in reversion, so as there were reserved so much, or as great and beneficial yearly and other rent and rents and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry in case the rents reserved were unpaid by the space of 28 days. And, also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine for any term not exceeding 31 years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent as could reasonably be obtained without taking any fine, and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof, and so as there were inserted such proper and usual covenants for the effectual winning and working the

mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature. The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease, and of 105*l.*, and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements thereafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions at *Michaelmas* and *Lady Day*, with a couple of fat capons, or 1*s.* 6*d.* in lieu thereof at the election of the lessor, and also an heriot of the best beast, or 40*s.* in lieu thereof, upon the death of every tenant dying in possession, and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and multure as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2*l.* and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that if at any time the rent of 2*l.*, and every or any of the duties, services, reservations, and

payments thereby reserved, or any part, should be unpaid or undone by 15 days next over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises, or if the lessees should leave the premises in decay six months after view had and notice given, or should commit any wilful waste, or grind their corn at any other mill, (the lessor's mill being in repair), or if the lessees should assign without licence, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, then the lessor, and the person to whom the freehold of the premises should belong, might re-enter: Held, by four judges against three, that the clause of re-entry in the lease did not pursue the form required by the leasing power. *Doe dem. Jersey v. Smith.* Page 97

PRACTICE.

And see ATTORNEY. COSTS. FINES AND RECOVERIES. ERROR. TRIAL AT BAR. VENUE.

1. If a *capias ad respondendum* be directed to the chamberlain of the county palatine of *Chester*, commanding him to take the Defendant, it is irregular, and the Defendant may take advantage of such irregularity. *Bracebridge v. Johnson.* 12
2. This Court will not interfere to take

take a party out of the criminal custody of the Court of King's Bench, in order to surrender him in discharge of his bail. *Currie v. Kinnear.* Page 23

3. The Defendant, having been served with common process, collared and violently shook the officer, and ordered him to quit his presence: Held, that, without disclosing more of the circumstances, this did not necessarily amount to a contempt of the Court and obstruction of its process, for which they would grant an attachment. *Adams v. Hughes.* 24

4. After bail put in and justified, and a subsequent demand of plea, and time allowed for pleading, it is too late to move to enter an *exoneretur* on the bail-piece, on the ground, that the Plaintiff has not declared on the cause of action, which he swore to in his affidavit to hold the Defendant to bail. *Knight v. Dorsy.* 48

5. The Court of C. B. entertained an argument, notwithstanding there had been an injunction in the Court of Exchequer against further proceedings in the Court of C. B. *Gorton and Another, Executors, v. Dyson.* 219

6. Where the Defendant was arrested again after a *non-pros*, the Court allowed the bail-bond in the second action to be cancelled, the Plaintiff not shewing that the second arrest was not vexatious. *Archer v. Champneys.* 289

And see *Williams v. Thacker.* 514

7. Where a Plaintiff, after being told

it was not usual to obtain the *postea*, or to tax costs, till the evening of the 4th day of term, obtained the *postea* before four o'clock on that day, under a promise not to tax costs, and on pretence of wishing to effect the stamping; but, instead of doing that, signed judgment, and issued execution; the Court set aside the judgment and execution, allowing the Defendant all his costs occasioned by such proceeding. *Blanchenay v. Van-den-Bergh.* Page 298

8. The Court notified that for the future, the *postea* shall not be delivered till the morning of the fifth day of the term. *Ibid.*

9. Where Plaintiff made affidavit, that he sued Defendant to recover damages for a breach of agreement in not entering into partnership, pursuant to a partnership deed drawn up and signed by Plaintiff, but remaining in the custody of the Defendant, or his attorney; and that the Plaintiff possessed neither copy nor counterpart of the deed; the Court granted a rule enabling the Plaintiff to inspect the deed and take a copy, though the Defendant swore he had not executed the deed. *Morrow v. Saunders.* 318

10. On a motion for leave to inspect a partnership-deed, the affidavit should state that the party moving has neither copy nor counterpart. *Ibid.*

11. The Court permitted the Defendant to set aside, for irregularity, a judgment on a *scire facias*, where the writ, being issued more than

ten years after the original judgment, was drawn up out of term, and issued on a *Serjeant's* signature, instead of being issued upon motion in Court, and where the Defendant had no personal notice of the proceeding. *Lowe v. Robins.* Page 381

- 1 On a motion to enter up judgment on an old warrant of attorney, the affidavit must state the Defendant to be alive on a day within the term on which such motion is made. *Regula Generalis.*

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- 13 Every notice for justifying bail in person shall be served before eleven o'clock in the forenoon of the day on which such notice ought to be served; except where an order of the Court, for further time, shall have been obtained, in which case it shall be sufficient to serve the notice before three o'clock in the afternoon of the day on which such order shall be granted; and in all the cases aforesaid, the affidavit of service shall specify the time of day at which such notice shall have been served.

Regula Generalis.

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14. The Court refused on *motion*, to assimilate the practice of the Court of *C. B.* to that of the Court of *K. B.* in proceedings against bail. *Howell v. Wyke.*

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15. The Defendants, having signed a regular bail-bond, were held to have waived the irregularity of the omission of their Christian names in a *capias ad respondendum* directing the sheriff to take Messrs. *L. and B.* *Kingston v. Llewellyn.*

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QUARTER SESSIONS.

PRINCIPAL AND AGENT.

See VARIANCE, 4.

PROBATE.

See EVIDENCE, 3.

PROCESS (OBSTRUCTION OF.)

See PRACTICE, 3.

PROMISSORY NOTE.

A., a trader, in embarrassed circumstances, being indebted to Plaintiff for money lent, and goods, Plaintiff promised, to induce *A.*'s creditors to agree to a composition on condition of *A.*'s giving the Plaintiff a promissory note for the money lent, signed by *A.* and another as security; the note was given by *A.* and signed by Defendant, as security; the Plaintiff and *A.* agreed to keep the matter a secret from *A.*'s creditors, and the Plaintiff endeavoured, but in vain, to accomplish a composition with them: Held, that the transaction was fraudulent and void, and that Plaintiff could not recover on the note against the Defendant. *Wells v. Girling.* Page 447.

PROMOTIONS, 387.

And see MEMORANDA.

QUARTER SESSIONS.

Certain referees were ordered by Act of Parliament to ascertain the amount of a yearly corn-rent, and the Court of Quarter Sessions was ordered to declare the amount. The referees having made their report to the Court of Quarter Sessions

REPLEVIN.

Sessions, the Court ordered it to be filed: Held, that this was no declaration by the Court of Quarter Sessions of the amount of the corn-rent. *Bendyshe v. Pearse.*

Page 460

RECEIPT.

See EVIDENCE, 1.

RE-ENTRY.

See POWER.

REFEREES.

See QUARTER SESSIONS.

REGULÆ GENERALES.

See PRACTICE, 12, 13.

RENT ARREAR.

See PLEADING, 2. REPLEVIN, 2.

REPLEVIN.

And see COSTS, 6, 7. PLEADING, 2.

STATUTE OF LABOURERS.

1. Where a Magistrate has competent jurisdiction, and adjudges, and on refusal to pay issues a warrant of distress and sale, the goods taken under it are not replevisable. *Dic-tum per Richardson J. Wilson v. Weller.* 57
2. Where the bailiff of an *executrix* made cognizance in replevin for arrears of rent incurred in the life time of the Testator, and a verdict was found for the Defendant, the Court would not permit the Plaintiff to enter up judgment *non obstante veredicto*, on the ground, that the record did not shew the *executrix* to be entitled to distrain under

SHERIFF.

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92. H. 8. c. 37. s. 1. *Martin v. Burton.* Page 279

REPUTED OWNER.

See EVIDENCE, 4.

RETURN.

See SHERIFF, 1.

SCIRE FACIAS.

See PRACTICE, 11.

SHERIFF.

1. Where the sheriff returned to a writ of summons on a writ of right, that he had summoned four knights, which was according to fact, but the officer of the court, in expectation that the knights were about to be sworn, had, before the return, written on the lower part of the same instrument that they were duly sworn, which was not true; in an action on the case against the sheriff for a false return, and for negligence, in not causing the knights to be sworn: Held, that the indorsement by the officer was no part of the return; that the sheriff was not answerable for the contents of such indorsement, and that the return was not false. Also, that the sheriff, being only commanded by the writ to summon the knights, was not guilty of negligence in omitting to have them sworn. *Windle v. Ricardo.* 17
2. Where goods had been seized under a *feri facias*, part of them sold on *Saturday*, and the remainder on *Monday*; an extent tested on the *Monday*, was put into

into the sheriff's hand at six o'clock, after the goods had been delivered to the purchasers, and the money received by the sheriff: Held, that the execution was executed, and that the party who issued the *feri facias* might recover of the sheriff in an action for money had and received, the money levied under the sale. *Swain v. Morland.* Page 370

SHIPS.

See BILL OF LADING. INSURANCE.

SHIP-OWNER.

See BILL OF LADING.

STAMP.

See EVIDENCE, 1.

STATUTE OF LABOURERS.

1. Where the statute of labourers gives a magistrate jurisdiction to examine upon oath any servant, &c. and to make order for payment of wages to such servant, and a magistrate, in his adjudication on this act, avers a complaint made on oath, and an examination on oath, it is not competent in replevin, for taking the Plaintiff's goods, for the Plaintiff to plead in bar of a cognisance, made under a warrant of distress and sale founded on that adjudication, that the servant did not duly make oath before the magistrate that the sum claimed was justly due to him for wages. *Wilson v. Weller.* 57
2. Nor can he plead that the sum claimed was not due. *Ibid.*

STRANDING.

See INSURANCE, 1.

TENANTS IN COMMON.

See EJECTMENT.

TIME.

See WITNESS, 1.

TITHES.

1. Where an occupier of land, who had been under composition for tithes, refused to pay the composition, or set out tithes in kind, alleging that he was exempted by a modus: Held, that in an action on 2 & 3 Edw. 6. for the treble value of the tithes, it was not necessary to prove a notice to determine the composition; the occupier's disclaimer of the rector's title to tithe in kind rendering notice unnecessary. *Bower v. Major.* Page 4
2. The rector's right to the tithe of lambs vests at the time when they are yeaned, although the tithe cannot be set out until they are fit to be weaned. *Welch v. Uppill.* 84

TRADE.

See INSURANCE, 2.

TRADER.

See BANKRUPTCY, 1, 3, 4.

TRESPASS.

See BANKRUPTCY, 5. COSTS, 5.
EVIDENCE, 5.

TRIAL AT BAR.

In a cause concerning rights of chase, involving documentary evidence of great length and antiquity, together with much oral testimony, the Court would not grant a trial at

at bar, a new trial having recently been refused in *K. B.*, where another Defendant, who had contested the same rights, had obtained a verdict. *Lord Rivers v. Pratt and Another.* Page 265

TRUSTEE.

See ANNUITY.

 USAGE.

See LANDLORD AND TENANT, 2.

USE AND OCCUPATION.

See BARON AND FEME.

USURY.

On the 11th of *May*, 1816, *A.* borrows of *B.* 80*l.* On the 9th *June*, 1817, *A.* and *C.* give *B.*, for that loan, a note of hand for 87*l.* 3*s.*, payable by four instalments, viz. on the 29th of *September* and 25th of *December*, 1817, and the 25th of *March* and 24th of *June*, 1818, with an agreement that the whole 87*l.* 3*s.* should be payable on default of any one instalment: Held, that the agreement was not usurious. *Wells v. Girling.* 447

 VARIANCE.

1. In the recital of a bond the differences were said to exist "between the above bounden *A.*, *B.*, and *C.*, and the above-named *D.*, *E.*, and *F.*" The declaration, in setting out the bond, laid the differences to exist between *A.*, *B.*, *C.*, *D.*, *E.*, and *F.*: Held, that
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this was no variance. *Winter v. White.* Page 350

2. Where a lease was stated in the declaration to be made by the Plaintiff on the one part, and *T. R.* on the other, but turned out, on evidence, to have been made by the Plaintiff and his wife on the one part, and *T. R.* on the other: Held, by three judges, (*Dallas*, *C. J. absente*) that this was no variance. *Arnold v. Revoult.* 443
3. One count of the declaration stated the consideration of a guarantee for 5000*l.* to be a certain credit to be given by *C.* and *Co.* to *V.* and *Co.* in a manner *then and there agreed upon* between the parties. The evidence to support this allegation consisted of letters to the following effect.

"My son informed me he was about to enter into some arrangements of a pecuniary nature for the house of *V.* and *Co.* in which he is a partner, and that it would be advantageous to have such arrangements, or part of them, carried into effect by drafts by me on you, payable to him or his order; and that he was persuaded I would guarantee you ultimate security: I therefore give you such guarantee to the amount of 5000*l.*"

"I find that the house of *V.* and *Co.* has deemed it expedient to establish a credit with some house in *London*, upon such terms as may be agreed upon by the parties; and that my son has written to you to fix that credit with you, not doubting that I would guarantee your ultimate security.

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My

My regard for my son induces me to give the guarantee in question."

"I gave you a letter of ultimate guarantee to the amount of 5000*l.* for such arrangements of a pecuniary nature, as my son might enter into with you, or for such part of them as might be carried into effect by drafts by me on you payable to him or order; and as I am since informed, that such arrangements have been, or are about to be, extended to the amount of 8000*l.*, I give you my ultimate guarantee for the additional sum of 3000*l.*"

"My guarantee for 5000*l.*; my guaranteeing temporary aid on an emergency; my guarantee in the same year for 3000*l.*, which last in its plain sense marks the event of the temporary aid, make the whole of my guarantee against ultimate loss 8000*l.*, and distinctly limit it to that amount."

Held, that there was no variance between the contract above stated, and that made out by this evidence.

Another count, supported by the same evidence, stated the consideration of the guarantee to be "that C. and Co. would give V. and Co. credit, in manner then and there agreed upon," and the promise given on such consideration, to be a guarantee for 8000*l.*

Held also, that there was no variance between this statement and the evidence adduced in proof of it. *Irving v. Mackenzie*. Page 523

4. The count stated, that the Plaintiff had retained the Defendant as

agent to cause the Plaintiff's ship to proceed "to *Gottenburgh*, in order that she might afterwards proceed to *St. Petersburg*:" the chief evidence adduced in support of this allegation was a written arrangement agreed upon between the Plaintiff's managing clerk and the Defendant, in which it was ordered, "that the ship should touch at *Gottenburgh* to know the state of things in *Russia*, and receive instructions:" and "that the captain should consign the ship to Defendant's correspondents at *St. Petersburg*, or any other place she might land her cargo at:" and a conversation between the Plaintiff's clerk and the Defendant, in which Defendant said "he had insured the ship from *Falmouth* to *Sheerness*, that at *Sheerness* she would join convoy to go to *St. Petersburg*, and that he would insure her from *Sheerness* to *Gottenburgh* and from thence to *St. Petersburg*:" Held, that there was a fatal variance between the count and the evidence. *Lopes v. De Tastet*. Page 538

VENDOR AND VENDEE.

The Defendants being unable to procure payment for barley which they had sold, and suspecting the vendee to be in bad circumstances, re-purchased the barley by a third person, and in his name, a short time before the bankruptcy of the vendee, who was not privy to the contrivance of the Defendants: Held, that this was no fraud within the

WIND-MILL.

the Bankrupt laws. *Harris v. Lu-*
nell. Page 390

VENUE.

In an action for a libel contained in a letter, the Court would not change the venue from *London* to *Worcester*, after an affidavit that the deponent believed the letter to have been written at *Stafford*, because it bore the *Stafford* post mark. *Hitchon v. Best.* 299

WARRANT OF ATTORNEY.

See PRACTICE, 12.

WIND-MILL.

See EXECUTION.

WRIT OF SUMMONS. 625

WINE.

See EXCISE.

WITNESS.

1. A witness cannot recover a compensation for his time, though an express promise be given him, that he shall be paid for his loss of time. *Willis v. Peckham* Page 515
2. Under the 13 G. 3. c. 63. the Court will grant a *mandamus* to the Court in *India*, to examine witnesses on behalf of the Defendant in a civil action. *Grillard v. Hogue.* 519

WRIT OF RIGHT.

See SHERIFF, 1.

WRIT OF SUMMONS.

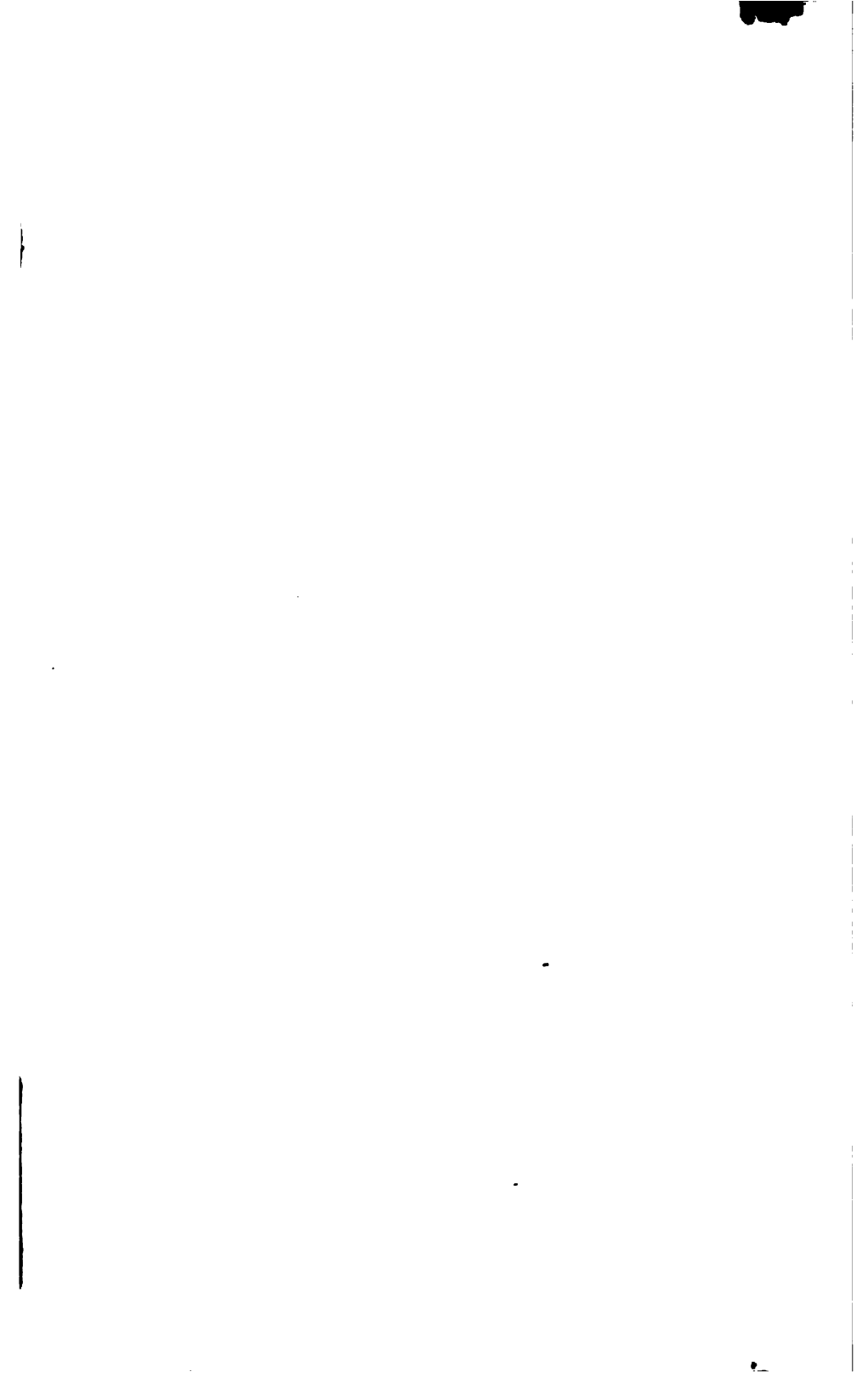
See SHERIFF, 1.

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